Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

LISA HAWKINS,

Petitioner,

v.

PEPSICO, INCORPORATED,
d/b/a Pepsi-Cola North America,
d/b/a/ Pepsi-Cola Bottling Company,
d/b/a Pepsi South,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

Petitioner brought race discrimination and retaliatory employment discharge claims under 42 U.S.C. § 1981. At the close of her evidence at trial, the court dismissed her claims pursuant to Fed.R.Civ.P. Rule 50. Petitioner's evidence included in part: respondents' production of five different reasons for her termination; petitioner's own testimony (which the court of appeals later dismissed as "self-serving"); testimony of co-workers with whom she worked (which the court of appeals dismissed as "close to irrelevant"); testimony of other African-Americans as to their similar treatment by the decision maker; fifty-three documents to support that she was performing her job well; contradictory testimony of Pepsi's top management; and petitioners' written and oral complaints of racism to numerous top management officials of Pepsi.

Questions presented to this Court are:

(1) Whether the court of appeals applied legal standards contrary to this Court's decisions in *Reeves v. Sanderson Plumbing Products, Inc.*

(2) Whether the court failed to properly consider evidence from which inferences of discrimination and retaliation could be inferred, in that, the court ruled that only the perception of the decisionmaker is relevant, and wholly discounted or dismissed testimony and documentary evidence presented by Petitioner as "self assessment" and "close to irrelevant."

(3) Whether the court of appeals misapplied this Court's rulings in *Burlington Industries, Inc. v. Ellerth, Faragher v. City of Boca Raton, Harris v. Forklift Sys., Inc.*, and *Oncale v. Sundowner Offshore Servs., Inc.*.

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PETITION FOR CERTIORARI

Lisa Hawkins respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 203 F.3d 274 (4th Cir. 2000) (App. pp.1-15). The court of appeals' denial of rehearing is unreported. (App. pp. 16-30) The opinion of the district court is reported at 10 F.Supp.2d 548 (M.D.N.C. 1998). The Magistrate's recommendation to grant summary judgment against the Petitioner on her hostile environment claim, and the district court's adoption of that recommendation, are unreported. (App. 32-50, 31).

JURISDICTION

The court of appeals' decision affirming the trial court's dismissal of petitioner's claims was entered February 15, 2000. The court of appeals' decision denying Petitioner's timely Petition for Rehearing and Rehearing En Banc was issued on March 14, 2000. On June 2, 2000, the Honorable Chief Justice of this Court granted an extension of time to file this petition until and including July 12, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 1981 of Title 42 of the United States Code provides, in pertinent part: "All persons... shall have the same right in every State... to make and enforce contracts... as is enjoyed by white citizens...." 42 U.S.C. § 1981.

The Seventh Amendment to the United States Constitution provides, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." U.S. Const. Amend. VII.

Rule 50 of the Federal Rule of Civil Procedure provides, in pertinent part:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue....

Fed.R.Civ.P. 50(a)(1).

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

Petitioner Lisa Hawkins brought this race discrimination and retaliation complaint against Pepsi, after Pepsi terminated her employment. Her complaint specifically alleged that Pepsi discriminated and retaliated against Hawkins on the basis of her race in violation of 42 U.S.C. § 1981; her complaint also alleged pendent State law claims that are not pertinent to this Petition. Before trial, the district court entered summary judgment dismissing Hawkins' claim of hostile environment. (App. p. 31) On May 6, 1998, Hawkins' discrimination and retaliation claims went to bifurcated trial on the issue of liability. Over the course of over two weeks' of trial, the jury heard the Plaintiff's evidence regarding her good work history at Pepsi, her transfer to a new department, her supervisor's discriminatory treatment and retaliation, including racially derogatory comments; the evidence included rebuttals by the Plaintiff and her co-workers of Pepsi's stated reasons for terminating the Ms. Hawkins – that is, her alleged poor conduct. The trial court refused admission of substantial other evidence that further supported an inference of discriminatory intent.[1] During the trial, while Pepsi offered a number of different reasons for Hawkins' termination, Hawkins' poor performance was the reason upon which it most aggressively relied as justification for her termination. However, as the trial court noted, Hawkins submitted substantial evidence from which a jury could disbelieve Pepsi's proffered reasons for Hawkins' termination:

> Much of the evidence that we have heard in this case, is to the effect that the reasons given by the defendant for termination is that Ms.

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[1] *See infra* note 8 for discussion of evidence that was excluded.

> Hawkins failed to do an adequate job in various areas. Plaintiff has spent a substantial amount of time showing that there was a pretext, and that she has offered evidence which, if the jury accepts, would tend to show that she was doing a good job, and she was not doing the things that she is alleged to have done, and the reasons for firing.

JA 2270 (emphasis added). Immediately prior to hearing Pepsi's Rule 50 motion, the trial court further commented that Pepsi would have a difficult time overcoming Hawkins' showing, stating:

> ... I will hear the defendant on whatever you wish to be heard on at this point, understanding that we do not need a jury argument, because if it is a jury argument, that means that it goes to the jury. But I must sort of tell you up front, to both sides, and I do want this to be fairly short, whatever you have to say, I want you to get everything on the record that you want. **From my perspective at this point, it occurs to me that the defendant would have a very difficult time on retaliatory firing. There may be a difference between that and a discriminatory firing.**

JA 3516 (emphasis added).[2] The district court nevertheless subsequently granted Pepsi's motion, based upon its legal determination that at-will employees such as Hawkins cannot

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[2] "JA" is used herein to referred to the Joint Appendix previously filed in the case at the Fourth Circuit. Within the JA, italicized evidence denotes that excluded by the trial judge. "App" refers to the appendix attached hereto.

maintain a Section 1981 claim.[3] The district court's written Order entered nearly two months later, on July 6, 1998, reiterated this reasoning, and also found that the Petitioner had failure to establish "pretext-plus," stating "Plaintiff must prove both that Pepsi's proffered reasons are false and that the real reason is intentional discrimination or retaliation," and "Plaintiff failed to present substantial evidence showing that her job performance was not a genuine reason for her discharge." (App. pp. 26-27, 28). Petitioner timely appealed to the Fourth Circuit, and on February 15, 2000 the court of appeals entered its decision affirming the trial court.

B. LISA HAWKINS' EVIDENCE OF RACE DISCRIMINATION AND RETALIATION.

Hawkins began employment with Pepsi in June 1990, holding several management positions in which she performed well. She was Pepsi's first African-American female Franchise Manager in the Carolinas, and was responsible for interfacing with bottler franchisees, one of whom was Lee Teeter. Hawkins complained to Pepsi's management about racial slurs and concerns she was told Teeter had made. JA 3508-3511.[4]

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[3] The judge's ruling on this point was subsequently rejected by the Fourth Circuit in *Spriggs v. Diamond Auto Glass*, 165 F.3d 1015 (4th Cir. 1999), which cited the judge's erroneous ruling in this case. Thereafter, the respondent herein, within footnote 1 in its Principal Brief before the Fourth Circuit, dropped this issue and acknowledged "the district court therefore erred in its ruling on that issue."

[4] The trial court excluded evidence of the nature of the racial slurs of which Hawkins had complained. She understood and reported to Pepsi's managers that Teeter had said that it was a mistake to make a nigger a manager. She complained to three of Pepsi's senior management, but the court precluded her or them from testifying of their conversations. The word "nigger" was ordered not to be used in the courtroom, despite conversations included that language. JA 3366-3367, 3079-3093, 1711-1719. Following Hawkins' complaints, rather than taking care of the problem, Pepsi sent Hawkins home on leave for six months until another job was found. She then assumed an administrative position.

Thereafter, she was transferred to various positions, and in June 1993, Hawkins was transferred to Pepsi's new Customer Service Center ("CSC") in Winston Salem, North Carolina, as one of its two new Tel-Sell Managers, at the request of two of her prior managers who were assisting her in finding a position. Her supervisor was Sally Price. JA 1817-1821, 3098, 3100-3101, 3251-3252.

In starting a new operation for Pepsi, Price was required to have her staffing appear "Right Side Up," a concept that purported to value diversity, and required that she place blacks in top positions. The top two blacks at the CSC were Hawkins and Fred Canady, both of whom were direct reports to Price and both of whom testified to similar problems with Price's maltreatment of them. Price did not know of Hawkins' complaint against Teeter, prior to agreeing to place her in the CSC.[5] Shortly after agreeing to that placement, in the summer of 1993, CSC's human resource manager (Jane Marvin), told Price of Hawkins' participation in prior protected activity and that she was suing Pepsi (which was not true). JA 2658-2659, 2678-2679, 2713, 2716, 2721, 2727-2729. Prior to Price's one-page "development feedback" to Hawkins, Price knew of Hawkins' prior racial complaints regarding the bottler.

Price treated Hawkins differently than (1) others who had not previously complained of race discrimination and (2) other similarly-situated white peers. Contrary to her white peers, Price failed to adequately inform Hawkins of her responsibilities and gave Hawkins handwritten instructions on scraps of paper, which she subsequently identified as hers at trial. Hawkins' white peers testified they did not receive

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[5] Trial testimony of Sally Price:

> Q: When -- before you hired Ms. Hawkins, did you have any knowledge that she had made any complaints about discrimination at Pepsi prior to coming to the CSC?
> A: Absolutely not.

JA 3623.

instructions from Price in this manner. Hawkins' suggestions at meetings were often openly criticized or laughed at by Price. Price rarely praised Hawkins in public and failed to acknowledge Hawkins' input, all of which was in contrast to Price's treatment of Hawkins' white peers. Price told Hawkins she was "not of the caliber" to be a CSC manager, but Hawkins never heard Price use the same phrase to describe a white person's performance. When Price criticized a document that Hawkins had prepared alone, Hawkins presented her with the same document later and falsely claimed that a white manager had worked with her on it, at which point Price told Hawkins the document looked great. Price admitted hosting a dinner in her home and giving gifts to all of Hawkins' peers, but not Hawkins (who was the only black in attendance). Contrary to the other white managers, Price ordered Hawkins to take a personality test in her office while she observed her and, thereafter, openly and publicly mocked her results. Price did not later laugh at white managers with the same personality type as Hawkins. Smith, a white co-manager, observed this mocking and testified it made her feel very uncomfortable. JA 3213-3215.

Many of these differences in treatment were corroborated by the testimony of those who observed Price's actions. For example, Price criticized Hawkins for not being a "team player," but Hawkins' team members directly contradicted that assessment. Price also accused Hawkins of upsetting her team, but that team confirmed that this was untrue and Price's accusations were untrue and unfounded. JA 3147-3149. Testimony at trial further confirmed that Price had not consulted the members of Hawkins' team prior to allegedly reaching her subjective assessment, thereby failing to follow or use Pepsi's policy of receiving and valuing "360 degree" feedback from co-workers and subordinates in the performance review process. JA 2052-2055. Price also criticized Hawkins for allegedly taking a "checklist approach to her phone interviews asking all the listed question but not doing the needed probing to make well founded selection decisions."

However, co-worker Smith, who also did this interviewing, testified that the interviewers, including Hawkins, were instructed not to deviate from the scripted questions. JA 1901-1906, 1912-1915, 3195-3196, 3832, 3855-3856. Price wrongfully criticized Hawkins of creating a rift between herself and the Somers, New York training lead person. JA 3932. However, Smith observed Hawkins' interaction with Somers' personnel, working together very hard as a team with the training consultants. JA 3204-3205, 3237. Price accused Hawkins of not attending to the details or providing follow through with a training program, in that (1) people did not know where to go; (2) training materials and A/V equipment were not in place when needed; (3) meals were not ordered or were ordered when not needed; and (4) one Root Map Learning session for eight performers had no facilitator. JA 1935-1936, 3832. However, the feedback of the managers who participated in the training is diametrically opposite. Smith testified Hawkins' performance with respect to the course work, rooms, training and performer group schedule was excellent, well thought out and planned, with rooms, schedules and snacks, noting great planning and attention to detail. JA 3200-3201. Shore testified there was no problem with a lunch not being ordered. JA 3177. Participants gave Hawkins' sessions the top-rated feedback of the sessions. JA 1959-1961, 4256-4257. Price also rated Hawkins "substantially below target" for not completing a task; that was not true. However, Smith testified that Hawkins had completed her work and was simply waiting for a peer manager to respond to her inquiries so that she could complete the project. JA 1944-1957, 3832, 4258, 4261-4262. Smith testified Hawkins completed this assignment timely. JA 3209-3210. Both Price and Marvin were aware that Hawkins had completed her work, was waiting for another manager, and she could not compel him to do his work. JA 1944-1957, 4258, 4261-4262. Price accused Hawkins of failing to develop and distribute an informational file, but Hawkins produced the document at trial. Price, not Hawkins, kept changing her mind about the focus and the questions she

wanted answered. Price did not change the substance, but merely the formatting -- over 20 times. JA 1965-1966, 1970-1986, 3990-3992, 4003, 4005-4125. Performing clerical work on the document, Shore confirmed this. JA 3177-3180. Although Price accused Hawkins of failing to develop a coaching and support program for the TSAs, Hawkins introduced the document showing the completion of that development program. JA 1995-2005, 4146-4160.

Hawkins' white peer managers, Healy and Smith, testified they worked very closely with Hawkins at the CSC, three days out of five, and observed her performance, as well as Price's treatment of Hawkins in comparison with Hawkins' white peers. JA 3193-3194. Smith testified that during team meetings Price frequently complimented the white managers, but never complimented Hawkins, and that Price's reaction to Hawkins' suggestions was "a rolling of the eyes and a sigh," in sharp contrast to Price's supportive reaction to ideas of the other white managers on the team. JA 3215-3217. Healy testified that Hawkins was a team player, communicating anything that would impact the team, always soliciting input before making decisions, sharing ideas, and following through on ideas. JA 3132-3134. Healy also testified to his observation that Price summarily dismissed Hawkins' ideas, but did not treat Hawkins' white peers in that manner. JA 3142, 3145, 3150-3151.

Canady, the only other top black at the CSC besides Hawkins and the only other black direct report to Price, had an undergraduate and MBA degree from Harvard. He too testified to similar unfair criticism by Price; of being belittled and scolded for not performing menial tasks; being told he was not "of the caliber" to be a manager; that he was the only director without an administrative assistant; and, like Hawkins, was unfairly rated as "below target" by Price. Canady and Hawkins had numerous conversations about Price. Canady testified that they felt:

> ...beaten down by Sally Price; that we felt we couldn't be proud of who we were, what we accomplished. We felt that our confidence level in ourselves and the decisions that we made, that we were questioning. We also talked about the difference in treatment of ourselves to our white peers. We also talked about that we felt it was a plantation mentality ... Price's name could not be mentioned at [Canady's] home during the weekends because of the frustration and anger he was feeling in the workplace. [Canady] felt that he was not -- he was not viewed as a team player, according to Sally Price; that she felt he wasn't of the management skill.... [Canady] working with Sally felt like literally beatings; ... she only talked about negative; she always talked about what I wasn't capable of doing, and that I wasn't of the caliber to work at the CSC, and that was on every occasion.

JA 2072-2073, 2076. Canady and Hawkins used "plantation" to describe the atmosphere of working for Price. Canady also used the word "plantation" to describe his meetings with Price, stating that "they were meeting to beat him up on who he was."

Pepsi has no policy on retaliation and no procedure for reporting and addressing discrimination and retaliation. The only policy available to Hawkins was in the CSC handbook, which provided only:

> Pepsi-Cola Company is an Equal Employment Opportunity Employer. Pepsi-Cola does not discriminate against any individual with respect to hiring, compensation, terms or conditions of employment based upon their race, color, religion, gender, national origin, veteran status, handicap or age. Nor does Pepsi-Cola limit,

> segregate or classify employees in any way to deprive individual employees of employment opportunities based on race, color, religion, gender, national origin, veteran status, handicap or age.

JA 3792. Between the fall of 1993 and her termination March 3, 1994, Hawkins sought advice and counsel from any and all sources she could identify within Pepsi's operation, and raised racial complaints about Price. She sought input within the CSC from her peer managers and from Canady, and also sought assistance from Pepsi's top management, including Pepsi's Chief Operating Officer (and Price's supervisor);[6] the Vice President of Corporate Development and Diversity; the Vice President of Employee Service; and the Southeastern Business Unit General Manager. JA 2050-2052, 2058-2062, 2077-2078, 2080, 2125-2126, 2128, 2132-2135, 2155-2156, 2281-2284, 2286-2287, 2306-2308, 2799, 3266, 3284-86, 3295. However, Pepsi took no material action to investigate or correct Price's treatment of Hawkins. Canady, the top black employee at the CSC, also made racial complaints to top management in the fall of 1993, but likewise received no response.

On March 3, 1994, the CSC human resources director met with Hawkins, giving her a termination letter dated

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[6] Among other things, on December 15, 1993, Hawkins sent a fax to Barnes, with a copy to Price, in response to Barnes' request for development feedback on Price. Hawkins stated:

> I have had to deal with a lot of issues since I started with Pepsi 3.5 years ago. Until work at Pepsi, I had never experienced such racism and sexual harassment in my whole life.

JA 2093-2099, 2108-2109. At trial, Barnes admitted receiving the memo, and further admitted making no response to Hawkins, never talking with her about it, and deciding to leave matters up to Price, because Price had told her the racism concerns were not in the CSC. JA 2126-2127, 3047-3048. Barnes' area of responsibility for Pepsi included all of the areas in which Hawkins had worked during her tenure with Pepsi.

February 22, 1994, which stated, "As your manager has just informed you, your employment will be terminated effective 3-4-94." Marvin told Hawkins that this had nothing to do with Hawkins' performance. Price thereafter refused to sponsor Hawkins for a sales position, claiming that she could not sponsor Hawkins because she had never seen Hawkins sell. However, Pepsi had no such policy and, in fact, Pepsi's policy was to assist employees in finding another position, so that termination was the last resort.

Throughout the litigation, various differing and conflicting reasons were proffered by Pepsi as its business justification for Hawkins' termination: (1) Hawkins' poor job performance; (2) the elimination of Hawkins' position; (3) Hawkins' failure to accept a different position at the CSC; (4) the unavailability of a sales position outside the CSC, despite Pepsi's voluminous national and international sales force; and (5) Hawkins' refusal to return to work because she was let go when she failed to return to work after receipt of the termination letter. At trial, Pepsi finally focused on its claim that Hawkins was terminated for performance-related reasons, relying substantially on (1) an October 20, 1993 one-page development feedback[7] that was delivered to Hawkins on the same date that Price provided Hawkins with her accountabilities (JA 3818); (2) a single performance appraisal (JA 3831-3835) dated February 8, 1994, just one and one-half months *after* Hawkins' December 15, 1993 faxed complaint of racism to Price's supervisor and *less* than a month before her termination on March 3, 1994 (a copy of which was not given

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[7] Development feedback is the name given by Pepsi for mid-year feedback. JA 3793. Far from being detailed, Price's handwritten feedback was short, and contained only one objective piece of feedback. The single specific concern mentioned in Price's development feedback to Hawkins -- that Hawkins had not provided her administrative assistant, Debra Shore, with proper coaching --was ultimately proved untrue at trial. Shore testified Hawkins had provided her with a clear understanding of her assignments and clear directions. JA 1881, 2017-2019, 3175-3176, 3822.

to Hawkins until the discovery in this case); and (3) Price's own subjective assessment of Hawkins' performance.

Price ultimately supported her decision to terminate Hawkins based upon her "below target" performance appraisal of February 8, 1994. JA 3831-3835. Price's comments in that appraisal were summarized into three areas of difficulty for Hawkins: (1) team building and alignment, (2) results orientation, and (3) thoughtful analysis. While the evaluation is critical and long, little if any corroboration of Price's assessment exists. However, as previously noted, the trial judge observed that Plaintiff spent a substantial time offering evidence which, if the jury accepted, would tend to show that she was doing a good job, and that the reasons proffered by Pepsi for her termination were untrue. JA 2270. That evidence included:

- Testimony of CSC human resource director Marvin that performance was not an issue in Hawkins' termination. JA 2330-2331.
- Testimony of Hawkins. JA 1856-1860, 1865-1868, 1887-1890, 1896-1937, 1944-2035, 2048-2099.
- 53 documents confirming her performance of the work in question. JA 3855-4301.
- Testimony of Shore, directly contradicting the single example in the development feedback. JA 2017- 2019.
- Testimony of co-worker managers, Healy and Smith, who worked with Hawkins and were members of her team, who testified on what they observed and her team work with them. JA 3132-3134, 3142, 3145, 3147-3151, 3193-3196, 3200-3201, 3204-3205, 3209-3210, 3215-3217, 3237, 3832.
- Documentary evidence of good performance prior to the CSC. JA 3771-1788.

No evidence, besides Price's naked assertions, one-page developmental feedback, and self-serving performance appraisal, was introduced to dispute these points.

C. PROCEEDINGS BELOW

As set out above, the district court judge initially ruled based upon an erroneous legal conclusion was subsequently overturned. While the judge's written opinion focused on the erroneous legal conclusion, it also ruled Petitioner's evidence must prove "both that Pepsi's proffered reasons are false and that the real reason is intentional discrimination or retaliation." In that Plaintiff failed to present substantial evidence showing that her job performance was not a genuine reason for her discharge, the court did not address respondent's other alleged legitimate, nondiscriminatory reasons for terminating petitioner.

The court of appeals ruled that Petitioner failed to prove that respondent's proffered reason, Hawkins' poor job performance, was mere pretext *and* that race was the real reasons for her termination. The court of appeals found that only the perception of the decisionmaker was relevant, not the self-assessment of Hawkins, as shown through offers of evidence that she was performing well in her job, including e-mails and memoranda written by Hawkins herself and statements made by coworkers, or the opinions of her co-workers. The court of appeals ultimately ruled that Hawkins had shown no more than a personality conflict that was an ordinary occurrence in a workplace setting. Likewise, summary judgment of Hawkins' racially hostile workplace claims was confirmed in that Price's actions were without a hint of racial significance. No mention was made of the retaliatory hostile environment claim. No mention was made of the similar treatment of other black employees.

REASONS FOR GRANTING THE PETITION

I. THE LOWER COURTS' DECISIONS ARE IN CONFLICT WITH THIS COURT'S RULING IN *REEVES v. SANDERSON PLUMBING PRODUCTS*

At trial, Hawkins presented substantial evidence that she was terminated because of her race and in retaliation for having complained about racism in the past. Pepsi's articulated reasons for her termination were subjective, conclusory, self-serving, and internally contradictory. In sharp contrast, Hawkins' evidence was substantial, objective, and replete with details, comprising both documents and testimony.

Under Fed.R.Civ.P. Rule 50, as clarified by *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. ___, 120 S.Ct 2097 (2000), the trial court was required to accept all of Hawkins' evidence as true, and to reject those portions of Pepsis' case that had been addressed by Hawkins. A summary of Hawkins' voluminous evidence of retaliation includes:

- Hawkins was Defendant's first African-American female franchise manager in the Carolinas.
- Before the CSC, Hawkins performed well, and was great in sales.
- Hawkins complained to Defendant's senior management that a bottler of Defendant referred to her as a "nigger," thus participating in protected activity. Rather than addressing the situation with the bottler, Hawkins was sent home and remained for six months until another job could be found.
- To appear "Right Side Up," supposedly valuing diversity, Price had to have some blacks in upper management at the CSC.

- In June 1993, when Hawkins was transferred into Price's facility, the CSC, Price did not know of Plaintiffs' prior protected activity.
- Hawkins and Canady (with his MBA from Harvard) were the only two senior level black managers at the CSC and were the only two direct reports to Price. Price did not transfer Canady into the CSC.
- In the summer of 1993, *after* Hawkins was transferred into the CSC, Price learned of Hawkins' protected activity and that she might be suing Defendant.
- In the fall of 1993 and continuing through early 1994, Hawkins complained to Defendant's senior management of racial problems at the CSC.
- In the fall of 1993, both Hawkins and Canady raised concerns of treatment at the CSC with Defendant's senior level management.
- Defendant's senior management had knowledge from Hawkins and Canady of racial concerns at the CSC and took insufficient steps to stop it.
- In December 1993, Hawkins complained in writing of 3.5 years of "racism and sexism" to Price, and to Price's supervisor, Defendant's chief operating officer;
- Prior to Price's minimal one-page "developmental feedback" October 20, 1993 to Hawkins, Price knew of Hawkins' prior racial complaints regarding the bottler.
- On February 3, 1994, shortly after Hawkins' December 1993 complaints of racism, Price gave Hawkins a poor performance evaluation dated in January.
- Hawkins' presented substantial evidence that the January 1994 evaluation was pretextual, in

that it contained false and dishonest criticisms. Hawkins presented substantial evidence from which a jury could determine she was a good performer.

- Co-workers testified as to their observations of Hawkins' work where they worked together, confirming that Hawkins was a team player and did her job.
- Co-workers testified as to their factual observations of Price's different treatment of Hawkins from similarly-situated white co-workers.
- Co-workers confirmed that Price failed to follow Defendant's policy of securing feedback from subordinates and peers for Hawkins' evaluation and then presented false criticism related to her work for and interaction with her team and subordinates.
- Canady, the only other top African American at the CSC, testified as to his treatment by Price, similar to that of Hawkins.
- Defendant failed to have adequate policies and internal procedures for the reporting of and addressing racial discrimination and retaliation.
- Defendant failed to properly investigate Hawkins' numerous complaints.
- Defendant terminated Hawkins a little over two and one-half months from the time of her December 15, 1993 complaint.
- Defendant presented inconsistent and conflicting reason for Hawkins' termination.
- On March 3, 1994, Price fired Hawkins, rather than recommending her for a sales position which was available and for which Hawkins was qualified.

Instead, however, the trial court appears to have weighed all of the evidence, made credibility determinations, and improperly taken the case from the jury. The court of appeals affirmed.

Both of the lower courts' decisions in this case are in direct conflict with decisions of this Court, both on procedural and substantive grounds. With respect to the proper application of Rule 50, the trial court's and the appellate court's decisions conflict with *Reeves*. Under Rule 50, court must disregard all evidence favorable to moving party that jury is not required to believe, so that court should consider all evidence favoring nonmovant, and only that evidence of moving party that is uncontradicted and unimpeached and comes from disinterested witnesses. Instead, in this case, the lower courts totally discounted Hawkins' substantial evidence of her good performance by characterizing her testimony as "self-assessment." Additional evidence of co-workers was dismissed by the court of appeals as "close to irrelevant," even though those co-workers had the opportunity to work with Hawkins, observe her, and receive her work. Contrary to this Court's holding in *Reeves*, the burden imposed by the court of appeals' on Hawkins was to provide evidence "Price actually believed [Hawkins'] performance was good." However, as this Court has previously noted, it is near to impossible to prove an employer's actual internal thoughts, partly because there is rarely any proof of those thoughts, and partly because a person's discriminatory attitudes likely superimpose a filter over the eyes when viewing the black person.

On a substantive basis, the lower courts' determination that the plaintiff was required to establish "pretext-plus" is not only unsupported by the prior decisions of this Court, but was soundly rejected in this Court's recent decision in *Reeves*.

Clearly, the court of appeal's decision, on its face, conflicts with *Reeves* and the cases cited therein. A grant of certiorari and reversal the judgment is merited in light of the clear misapplication of proper legal standards, as well as the

trial judge's admission that Petitioner had offered evidence which, if the jury accepts, would tend to show that she was doing a good job.

II. INFERENCES OF DISCRIMINATION ARE PERMISSIBLE FROM NUMEROUS TYPES OF EVIDENCE.

The trial court clearly denied admission of substantial probative evidence, particularly of other examples of persons to corroborate Hawkins' testimony including the testimony of other blacks similarly treated by Price. This evidence was clearly relevant.[8] *Brennan v. GTE Gov't Sys. Corp.* 150 F.3d

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[8] The trial court excluded: (1) testimony showing racial animus on the part of Price, JA 2349-2350, 2908-2909, 2912, 3401-3404, 3506; (2) testimony by Hawkins' co-managers that Hawkins was treated differently by Price, JA 3142, 3146, 3159 3210; (3) testimony corroborating Hawkins' complaints that Price treated Hawkins differently, JA 2749, 2872-2885, 3128-3131, 3169-3172; and (4) testimony that Price treated other African-Americans similarly to Hawkins and different than white employees. JA 3287, 3443, 3449, 3455, 3502. The trial court improperly excluded testimony of racial animus with respect to Price's comments and actions; Hawkins' own testimony of Price's angry reaction when Hawkins suggested a race relations task force at the CSC and her testimony of Price' angry reaction to the development feedback memo which Hawkins sent to Barnes was not allowed. Price's reaction when racial concerns or complaints are raised is highly relevant. Although Hawkins testified as to what Canady told her about comments Price made to him, Canady's testimony regarding Price's racially-biased comments was excluded. Canady was not allowed to testify to corroborate Hawkins' testimony regarding "Miss Sally," the CSC "plantation," the "beatin's, and how he and Hawkins felt they were being treated by Price. Hawkins and Canady would discuss the plantation-like atmosphere and what it was like to be under "Miss Sally" at the plantation. The trial judge even prohibited any witness and the counsel from using the word "Miss" and the first name of the individual. The use and inflection of the words "Miss Sally" in conjunction with the CSC plantation was significant to describe the culture and atmosphere as felt by the blacks. Changing the language totally changed the meaning of the testimony and was prejudicial. The court also disallowed Canady's testimony regarding his belief that Price treated African Americans more harshly than she did white employees, thus corroborating Hawkins; also excluded is his testimony that he was over-criticized by Price, and African

21, 27-28 (1st Cir. 1998)(evidence relating to the treatment of other persons in the same protected class is relevant to a case of discrimination); *Simpson v Kay Jewelers*, 142 F.3d 639, 644 (3rd Cir. 1998)(plaintiff may prove employer's proffered legitimate reasons 'unworthy of credence' or false by showing that the employer had previously discriminated against her or that the employer has discriminated against other persons within the plaintiff's protected class); *Fuentes v. Perkskie*, 32 F.3d 759, 765 (3rd Cir. 1994); *Huff v. Uarco, Inc.*, 122 F.3d 374, 380 (7th Cir. 1997(one way to prove discrimination is through comments directed at others in same protected group);*Carter*, 132 F.3d at 644 (testimony from other members of the protected class was improperly stricken by the district court); *Carey v. Mount Desert Island Hospital,* 156 F.3d 31, 34 (1st Cir. 1998)(circumstantial evidence of a discriminatory atmosphere at Plaintiff's place of employment is relevant to the question of motive in considering a discrimination claim. *Conway v. Electro Switch Corp.*, 825 F.2d 593, 597-98 (1st Cir. 1987).

The court of appeals compounded the problem by refusing to consider evidence relative to appropriate probative

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Americans felt Price's style differences more than white employees; and Canady's corroboration that Hawkins was being criticized by Price on a particular report when his opinion was that she did a good job on the report. In addition, Jackson was not allowed to testify that Canady had reported to him concerns about his treatment by Price. Canady recalled Price asking him if he saw any whites all weekend in the part of Winston-Salem where he lived and what his black peers from childhood thought about Canady having gone to Harvard and whether or not he still saw them. In addition, testimony regarding a CSC-wide meeting where Price made the comment that no black employee of the CSC was qualified to be a manager was also excluded. Although this comment occurred just a few months after Hawkins' termination, it showed Price's racial animus. Hawkins also testified that Price used the words "not of the caliber" to describe allegedly low performing African Americans, but not whites, but the court disallowed testimony regarding Price's use of the term "not of the caliber" to describe another African American, Harold Owens. JA 1890-1895.

evidence and its weight,[9] declaring that testimony "irrelevant" and "speculative", further declaring that Price's management style was "without a hint" of racial significance. Its decision is contrary to and in conflict with the decisions of other courts of appeals. Additionally, trial courts may more quickly characterize evidence as being "irrelevant," exclude it from evidence on that basis, and thus, if not within evidence, the court need not o treat it as being credible.

Much, if not all, of this evidence would have supported an inference of discrimination, and supported denial of Pepsi's Rule 50 motion. The court of appeals failed to consider Hawkins' objections to the trial court's evidentiary rulings, dismissing those objections in one sentence as being without merit.

As noted herein, the various courts of appeals are strongly divided over the admissibility and weight of evidence probative of discrimination. The confusion and contradictory rulings in the federal courts will only increase even more, unless this Court takes the opportunity to further clarify its decision in *Reeves*, answering the question of how a litigant must minimally establish falsity or dishonesty or discriminatory intent, sufficient to allow the case to go to the jury.

In this case, the court of appeals rested on the simplistic cop-out that the decisionmaker's perception is the only thing relevant, not the self-assessment of the plaintiff, not the opinion or observations of her co-workers, not the documentary evidence rebutting the decisionmaker's proffer. Other courts of appeals have applied the same analysis. *See Shorette v. Rite Aid of Maine Inc.*, 155 F.3d 8 (1st Cir. 1998)(plaintiff's evidence was insufficient to show pretext because only evidence that plaintiff produced was his own testimony, as compared to two witnesses from defendant who described plaintiff's inability to perform core job functions); *Shapolia v.*

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[9] *See supra* notes 4 and 8 and accompanying text for itemization and discussion of this proof.

Los Alamos Nat'l Lab., 922 F.2d 1033, 1039 (10th Cir. 1993)(it is perception of decisionmaker which is relevant, not self-assessment of plaintiff); *Tinsely v. First Union National Bank*, 155 F.3d 435 (4th Cir. 1998)(affidavits put forth by plaintiff showing that co-workers, customers, and others thought Plaintiff was doing a good job were irrelevant as they did not show that management honestly believed that plaintiff was doing a good job); *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960-61 (4th Cir. 1996)(it is perception of decisionmaker that is relevant to question of retaliation not opinions of plaintiff's co-workers and third parties); *Nichols v. Grocer*, 138 F.3d 563 (5th Cir. 1998)(plaintiff's own good faith belief that sex motivated her employer's action is of little value); *Little v. Republic Refining Co., Ltd.*, 924 F.2d 93, 96 (5th Cir. 1991)(subjective belief of discrimination, no matter how genuine, cannot be basis of judicial relief); *Adreani v. First Colonial Bankshares Corp.*, 154 F.3d 389 (7th Cir. 1998)(perception of decisionmaker, not plaintiff, is important); *Fortier v. Ameritech Mobile Communications, Inc.*, 161 F.3d 1106 (7th Cir. 1998)(plaintiff's subjective self appraisal cannot create genuine issue of fact regarding honesty of defendants assessment of plaintiff).[10] This analysis leaves those plaintiffs

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[10] Several other decisions point to a conflict among the circuit courts of appeals: *Cf. Thomas v. Denny's Inc.* 111 F.3d 1506, 1510-11 (10th Cir. 1997) (plaintiff presented enough evidence through his own testimony and that of his prior managers that he was qualified to be promoted); *Bogle v. Orange County Board of County Commissioners*, 162 F.3d 653, 657 (11th Cir. 1998)(plaintiff's testimony and the testimony of his witnesses were insufficient because they were unverified and not based on personal knowledge, noting that stronger anecdotal evidence may be enough to cast sufficient doubt on defendant's nondiscriminatory reasons); *Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 643-44 (11th Cir. 1998)(the court looked to the testimony of plaintiff and other employees to rebut the defendant's assertions); *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1290(D.C. Cir. 1998)(question of discriminatory intent will hinge on the party's credibility, an issue that is quintessentially one for the finder of fact); *Bray v. Marriot Hotels*, 110 F.3d 986, 995 (3rd Cir. 1997)(while plaintiff's belief alone may be insufficient to raise an issue of material fact, it takes on added significance when combined with other evidence); *Danzer*

whose performance and actions are assessed on subjective basis with an impossible burden, one that undoubtedly was not intended with the adoption of the discrimination laws. Courts of appeals are using this blanket statement relative to the decision maker's assessment to justify an easy, mandatory ruling that the decisionmaker wins.

Moreover, it is apparent that even after *Reeves*, some courts are likely to continue to require pretext-plus, but dress it up as a finding that plaintiff's evidence of pretext has no probative value. *See, e.g., Rubenstein v. Administrator of the Tulane Educ. Fund*, ___ F.3d ___, 2000 U.S.App. LEXIS 15614 (4th Cir. 7/06/00)(irrespective of *Reeves*, plaintiff must establish discriminatory intent in addition to showing pretext). Some courts have misapplied the standards for so long, they may have difficulty seeing circular reasoning. For example, Hawkins was criticized for spending time disputing the merits of Price's evaluation. Rather, the court of appeals stated, she should have been showing that "Price's assessment of her performance was dishonest or "not the real reason for her termination." Showing that an evaluation is without merit certainly should provide a basis for finding pretext and, in a proper situation, this fact could also assist a trier of fact to conclude unlawful discrimination occurred. Subjective proferred reasons for adverse actions will likely become even more prevalent in an effort to argue that an employee did not prove the employer's proferred reason was false, to try to avoid a finding of pretext as set forth in *Reeves*.

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v. Norden Sys., 151 F.3d 50 (2nd Cir. 1998)(a nonmovant's affidavits alone can as a matter of law, suffice to defend against a motion for summary judgment);

III. THE LOWER COURTS MISAPPLIED THIS COURT'S RULINGS ON HAWKINS' HOSTILE ENVIRONMENT CLAIMS.

This Court established rules under Title VII whereby an employer is vicariously liable for the acts of its supervisors that create a sexually hostile working environment for those whom they supervise, unless the employer can affirmatively establish that it exercised reasonable care to prevent and promptly correct any harassing behavior, and that the complaining employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or provide harm otherwise. *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998).

In *Harris v. Forklift Sys., Inc.*, this Court ruled, again in the context of sexual discrimination, that an objectionably hostile environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). Accordingly, the lower courts were to determine whether an environment was sufficiently hostile or abusive by "looking at all the circumstances," including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Faragher*, 524 U.S. at 788 (quoting *Harris*, 510 U.S. at 23). It is not necessary that the environment be so hostile as to result in psychological injury. *Harris*, 510 U.S. at 22. The truly critical inquiry is whether members of the subject class (in this case, African-Americans) are exposed to disadvantageous terms or conditions of employment to which members of the other class (whites) are not. *See Harris*, 510 U.S. at 25 (Ginsburg, J., concurring). To establish that an environment was sufficiently hostile,

therefore, it is sufficient to present proof that a reasonable person subjected to the discriminatory conduct would find that the harassment had so altered working conditions as to make it more difficult to do the job. *Harris*, 510 U.S. at 25. In addition, the social context in which the particular behavior occurs and in which it is experienced by its target should be considered, as "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Oncale v. Sundowner Offshore Servs.*, Inc., 523 U.S. 75, 82, 118 S.Ct. 998, 1003 (1998).

These same standards are applied to an employer that has allowed a racially hostile or retaliatory environment to exist. When these standards are applied to this case, it is apparent that the court of appeals has erred in affirming the district court's summary judgment dismissal of Lisa Hawkins' claim. In accordance with *Reeves*, credence must be given to the evidence supporting Hawkins as well as that evidence uncontradicted and unimpeached evidence coming from disinterested witnesses. As set out above, the totality of the evidence established that during the relevant timeframe Price treated Hawkins (an African American) significantly differently from similarly-situated white peers, on a continual, virtually daily basis. Both the district court and the court of appeals erroneously considered each of these instances separately, without considering the totality of these circumstances upon Lisa Hawkins' work environment. Under the standards set out in *Harris*, *Oncale*, *and* Reeves, the evidence was sufficient to establish an actionably hostile environment, so that summary judgment was inappropriate.

Because the court of appeals ruled that the environment was not sufficiently hostile to support Lisa Hawkins' claims, it failed to reach the question of whether Pepsi had presented evidence sufficient to give rise to the affirmative defenses

permitted by *Faragher* and *Ellerth*.[11] If the court had considered that issue, however, it would have been required to find that Pepsi could not establish such affirmative defenses.

First, Pepsi's policy was wholly inadequate to provide any reasonable relief from Price's conduct. As set out above, that entire policy provided only that Pepsi was an "Equal Employment Opportunity Employer," and did "not discriminate." JA 3792. The policy provided no procedure for lodging complaints of discriminatory treatment, or no guidance as to what conduct might be impermissible, no direction as to whom concerns and complaints should be directed, or any avenues for addressing and eradicating discrimination. Retaliation was not even mentioned.

Second, as set out above, Lisa Hawkins did timely complain and seek assistance from various members of Pepsi's upper management, but not one of these members of senior management took any meaningful action to either investigate or correct Price's behavior. In addition, Canady had also complained to top management about treatment of blacks at the CSC in the fall of 1993. When the Southeastern Business Unit manager was at the CSC and found that Price even had a problem with the work of Debra Shore, a black receptionist, he knew the validity of the concerns. But no one investigated or took any action to stop the harassment.

The evidence was sufficient to support Lisa Hawkins' claims of hostile environment as a result of discrimination and retaliation, and summary judgment dismissing that claim was erroneously entered.

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[11] The district court's decision was entered in January 1998, prior to the issuance of this Court's decisions in *Faragher* and *Ellerth*.

CONCLUSION

The court of appeals clearly failed to apply the legal standard in *Reeves* and must therefore be reversed. In addition, Petitioner urges the Court to take this case as a sequel to *Reeves* to provide further direction and guidance in the area of the sufficiency of evidence for an inference of discrimination and retaliation. Because of the numerous and various types of evidence presented under the facts of this case, with the evidence both admitted and excluded by the trial court, this Court's review and analysis could build on *Reeves* to ensure employers are unable to later mask their actions, and instead take seriously discrimination laws and know their obligations, and to ensure that the intent of the discrimination laws are achieved. Proper direction would assist plaintiffs' and defendants' counsels to properly assess the strengths and weaknesses of cases, and provide the lower courts with more direction in making the appropriate inquiries and presentations of proof to ensure uniform application and enforcement of the laws.

The Court is urged to grant certiorari.

Respectfully submitted,

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PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2193

LISA HAWKINS,

Plaintiff-Appellant,

v.

PEPSICO, INCORPORATED,
d/b/a Pepsi-Cola North America,
d/b/a Pepsi-Cola Bottling Company, d/b/a Pepsi South,
Defendant-Appellee.

AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION, INCORPORATED; NORTH CAROLINA ACADEMY OF TRIAL LAWYERS,
Amici Curiae.

Appeal from the United States District Court
for the Middle District of North Carolina, at Winston-Salem.
William L. Osteen, District Judge.
(CA-96-1013-6)

Argued: October 26, 1999
Decided: February 15, 2000
Entered: February 15, 2000

Before WILKINSON, Chief Judge, and WIDENER and KING, Circuit Judges.

Affirmed by published opinion. Chief Judge Wilkinson wrote the opinion, in which Judge Widener and Judge King joined.

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OPINION

WILKINSON, Chief Judge:

Appellant Lisa Hawkins filed an employment discrimination suit against appellee PepsiCo, Inc. Hawkins alleged, inter alia, that her supervisor created a racially hostile environment and terminated Hawkins because of racial animus. Hawkins, however, has shown nothing more than a routine difference of opinion and personality conflict with her supervisor. Because we refuse to transmute such ordinary workplace disagreements between individuals of different races into actionable race discrimination, we affirm the judgment of the district court dismissing Hawkins' claims.

I.

Lisa Hawkins was employed by Pepsi from 1990 to 1994. She began as a Brand Manager and was promoted to Franchise Manager in 1991. She became an Administrative Manager in 1992 and served in that position until it was eliminated in June 1993. That same month, Hawkins was hired by Sally Price, General Manager of Pepsi's newly formed Customer Service Center (CSC) in North Carolina, to be a Tel-Sell (telephone sales) Manager. Hawkins reported directly to Price in her new position.

Because the district court dismissed Hawkins' claims on Pepsi's motions for summary judgment and judgment as a matter of law, we view the evidence in the light most favorable to her. See *Hartsell v. Duplex Prods.*, Inc., 123 F.3d 766, 768 (4th Cir. 1997); *Brown v. CSX Transp., Inc.*, 18 F.3d 245, 248 (4th Cir. 1994). Hawkins, who is African-American, claims that Price, who is white, engaged in various forms of race discrimination against her at the CSC. Hawkins advances a long list of complaints about Price. She alleges that she and Price had a strained

relationship that was unlike the relationships between Price and the white managers Price supervised. Price did not adequately inform Hawkins of her responsibilities and gave Hawkins instructions on scraps of paper. Hawkins' suggestions at meetings were often criticized or laughed at by Price. Price rarely praised Hawkins in public. Price failed to acknowledge Hawkins' input and criticized her for not being a "team player." Hawkins perceived all of this to be in marked contrast to Price's treatment of Hawkins' white peers. Price also told Hawkins that she was "not of the caliber" to be a CSC manager, but Hawkins never heard Price use the same phrase to describe a white person's performance. Hawkins further claims that Price subjected Fred Canady, the only other African American who reported directly to Price, to similar criticism.

According to Hawkins, when Price criticized a document that Hawkins had prepared, Hawkins presented her with the same document the next day and falsely claimed that a white manager had also worked on it. Price then told Hawkins that the document looked great. Price also gave gifts to all managers except Hawkins during a dinner at Price's home. After Hawkins took a personality test upon Price's orders, Hawkins believed Price mocked the results even though Price did not laugh at white managers with the same personality type. When Hawkins suggested that she and Price attend a seminar entitled "Successful Managerial Skills for Black Managers," Price refused.

What Hawkins disputes most vigorously, however, is the accuracy of Price's evaluation of her job performance. For example, in a January 1994 performance appraisal, Price rated Hawkins "below target" in several areas and criticized her even in areas where Hawkins received a satisfactory grade. Hawkins alleges that Price's assessment of her performance was excessively negative and often based on erroneous information. Hawkins also claims that Price's feedback was in some instances too general and failed to elaborate on the positive aspects of Hawkins' performance.

Hawkins further states that Price also gave Canady a "below target" rating while rating all white employees who reported to her "on target" or" above target."

Hawkins complained about Price to several members of Pepsi's senior management. For example, Hawkins faxed a memo to Pepsi's Chief Operating Officer but allegedly received no response. Hawkins states that she also shared this memo with Price and discussed it with her to no avail. Several other senior managers advised Hawkins on dealing with Price and said that they would follow up on the matter. Hawkins claims, however, that Pepsi's efforts to investigate and remedy her situation were on the whole inadequate.

Hawkins also states that she had previously complained to Pepsi management about racial concerns when she was a Franchise Manager. She alleges that long before she encountered Price, she had racial problems with Lee Teeter, a Pepsi bottler, and that her complaints caused racial tension with her supervisor at the time. Hawkins claims that Price was aware of Hawkins' complaints stemming from this incident.

In February 1994, Hawkins met with Price and CSC Human Resources Director Jane Marvin for a performance review. They discussed Hawkins' performance, Hawkins' difficulties with Price, and the possibility of Hawkins' seeking other employment, including a sales position within Pepsi. Price cautioned, however, that she was uncomfortable recommending Hawkins for a sales position because she had not seen her sell.

On March 3, 1994, Hawkins met with Price and then Marvin to review her situation. During her time at the CSC, Hawkins had worked mostly on special projects for Price rather than in a Tel-Sell capacity. Marvin stated that Hawkins was no longer needed for special projects and that there was no Tel-Sell opportunity for her in the CSC. Marvin also said that no sales position was available for Hawkins. Marvin then handed Hawkins a termination letter informing her that she was discharged effective the following day.

On September 12, 1996, Hawkins filed an employment discrimination lawsuit against Pepsi in the United States District Court for the Middle District of North Carolina. Hawkins alleged that Pepsi discriminated against her on the basis of race in violation of 42 U.S.C. § 1981 and state law. She claimed that she was the victim of a hostile work environment and was wrongfully discharged because of her race and/or in retaliation for her complaints of race discrimination. Hawkins also accused Pepsi of intentional and negligent infliction of emotional distress.

At the close of discovery, the district court granted summary judgment to Pepsi on a number of Hawkins' claims. The court held that Hawkins had failed to produce sufficient evidence of a racially hostile environment. The court also dismissed her emotional distress claims and held that any claims based on events prior to Hawkins' tenure at the CSC were time-barred.

The parties proceeded to trial on Hawkins' remaining claims of discriminatory and retaliatory discharge. After Hawkins had presented her case, Pepsi moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a). The district court granted Pepsi's motion on two alternative grounds. See *Hawkins v. PepsiCo, Inc.*, 10 F. Supp. 2d 548 (M.D.N.C. 1998). First, the court held that an at-will employee cannot maintain a § 1981 action for wrongful termination because the employer and employee have no contractual relationship concerning the duration of employment. See id. at 553-54. This ground has subsequently been rejected by our decision in *Spriggs v. Diamond Auto Glass*, 165 F.3d 1015, 1018-19 (4th Cir. 1999) (holding that an at-will employment relationship is contractual and may serve as a predicate contract for a § 1981 claim). Second, the district court held that Hawkins had failed to produce sufficient evidence to support her claims of discrimination and retaliation. See *Hawkins* , 10 F. Supp. 2d at 554-55.

Hawkins then appealed the district court's dismissal of all her employment discrimination claims.

II.

A.

Because Hawkins presents no direct evidence of discrimination, her discriminatory discharge claims are subject to the burden-shifting scheme of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989) (McDonnell Douglas scheme applies to § 1981 actions). Assuming arguendo that Hawkins has made a prima facie case of race discrimination, "the burden of production shifts to [Pepsi] to articulate some legitimate, nondiscriminatory reason" for its action. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996) (internal quotation marks omitted). Once Pepsi meets this bur- den, Hawkins must prove that Pepsi's proffered reason was mere pretext and that race was the real reason for her termination. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-08 (1993). To avoid judgment as a matter of law on this question, Hawkins must establish a "legally sufficient evidentiary basis for a reasonable jury to find for [her]." Fed. R. Civ. P. 50(a). "[S]ummary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991).

Pepsi asserts that Hawkins was terminated for performance-related reasons. Pepsi claims that Hawkins performed poorly in her special projects capacity and failed to improve even after receiving negative feedback. Pepsi also states that Hawkins' poor performance, coupled with the lack of available work, led Price to discontinue Hawkins' special projects position and not to place her in a different position with Pepsi. Hawkins contends that Pepsi's justification is

pretextual and that she was instead terminated because of Price's racial animus toward her. The district court found, however, that Hawkins failed to carry her burden of producing sufficient evidence to support a finding of intentional discrimination.

Hawkins has failed to demonstrate that the district court erred. To begin with, Hawkins has failed to show that Pepsi's proffered reasons for her termination were pretextual. Hawkins claims that Price's criticisms were inaccurate and insists that she actually performed her CSC job well. But when an employer gives a legitimate, non-discriminatory reason for discharging the plaintiff, "it is not our province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination." *DeJarnette v. Corning Inc.*, 133 F.3d 293, 299 (4th Cir. 1998) (internal quotation marks omitted). And Hawkins cannot show that Pepsi's stated reasons for terminating her were not the real reasons for her discharge.

Hawkins fails, for example, to supply evidence that Price actually believed her performance was good. In fact, the evidence presented by Hawkins shows that Price considered Hawkins' performance to be generally poor. For instance, Hawkins submitted into evidence Price's January 1994 performance appraisal of Hawkins. This appraisal appears to be Hawkins' biggest bone of contention in this case. Price evaluated Hawkins' performance in four specific areas, or "accountabilities." The four accountabilities were: (1) "With CSC A/R and Tel-Sell Teams, select, on-board, and train A/R and Tel-Sell performers for start-up operation"; (2) "Build information resource for CSC on existing Tel-Sell operations at Pepsi and at relevant bench mark companies"; (3) "Support 10-X Lab and FIT team in finalizing Tel-Sell Design and Implementation"; and (4) "Field Ready Materials developed for National Roll-out of Centralized Tel-Sell."

Each of these accountabilities was broken down into one or more specific "measures." Price assigned a rating,

accompanied by detailed written comments, to Hawkins' performance on each of these measures. On the first accountability, Price rated Hawkins "on target" on one measure, "below target" on another, and "significantly below target" on another. On the second accountability, Price gave Hawkins an "on target" rating on one measure and a "below target" rating on two others. On the third accountability, Price rated Hawkins "on target" on one measure and "below target" on another. On the fourth accountability, Price rated Hawkins "on target."

Price gave Hawkins an overall rating of "below target" on the appraisal. Price's general comments on Hawkins' performance consisted of the following:

> Lisa demonstrated flexibility in responding to the changes in her accountabilities caused by the slow-down in the national roll-out of Tel-Sell. Her performance against these accountabilities though has not met targeted expectations. Lisa consistently has faced difficulties in three areas: (1) team building and alignment, (2) results orientation, (3) thoughtful analysis. Lisa's performance was on target when tasks were specifically spelled out for her, required little independent thought, and when she did not need to solicit input or involvement from others. Her performance was below target when she was required to interact with others to gain information or deliver results, when she needed to develop her own project structure and sustain her own project momentum or when she needed to provide her own insights and draw her own inferences from information. Lisa consistently dropped the ball on projects, provided inadequate follow-through and, as a result, missed

> deadlines. She is too quick to hand-off tasks to others and jumps to obvious conclusions without analyzing alternatives or thinking through implications. In addition, Lisa has been too easily distracted by non-business issues particularly ones involving personnel issues or office politics. She fills a disproportionate amount of her time on non-business issues and can be a distracting influence. As a member of the leadership team, I expect Lisa to rise above these issues and focus her energies on creating a positive work environment and delivering concrete business results. Overall, Lisa's performance has been unacceptable for someone at her level in the organization.

This appraisal, along with other evidence introduced by Hawkins, shows quite strongly that Price was dissatisfied with Hawkins' performance. But instead of producing evidence that shows Price's assessment of her performance was dishonest or not the real reason for her termination -- as the law requires -- Hawkins disputes the merits of Price's evaluations. Hawkins took vigorous issue with the January 1994 performance appraisal at length both at trial and in her brief. She argues that she performed well in her job and offers evidence in an effort to support this contention, including e-mails and memoranda written by Hawkins herself and statements allegedly made by her co-workers. In doing so, Hawkins can prove only the unremarkable fact that she and Price disagreed about the quality of her work. But we have repeatedly held that in a wrongful discharge action "`[i]t is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff.'" Id. (quoting *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960-61 (4th Cir. 1996)); see also *Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980). The alleged opinions of

Hawkins' co-workers as to the quality of her work are similarly "`close to irrelevant.'" *DeJarnette*, 133 F.3d at 299 (quoting *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 235 (4th Cir. 1991)).

In short, we do not sit to appraise Price's appraisal. Rather, "[o]ur sole concern is whether the reason for which the defendant discharged the plaintiff was discriminatory." Id. (internal quotation marks omit-ted). Hawkins' extensive efforts to rebut Price's assessment of her performance simply do not provide a legally sufficient basis for this conclusion.

Hawkins also disputes Price's alleged inability to find a position for Hawkins. But Hawkins does not, for example, provide evidence that Price's decision not to sponsor her for a sales position was due to anything other than Price's assessment of her CSC performance and unfamiliarity with her sales ability. Further, Pepsi was not obligated to provide employment to Hawkins even if an appropriate position were available. For § 1981 does not compel employers to practice "economic altruism and thereby immunize protected class members from discharge" for performance-related reasons. *Gairola v. Virginia Dep't of Gen. Servs.*, 753 F.2d 1281, 1287 (4th Cir. 1985).

Moreover, Hawkins does nothing more than speculate that Price terminated her out of racial animus. The thrust of Hawkins' claims is that Price inappropriately criticized and insulted her in various ways. Hawkins accuses Price of such things as regarding her as "not of the caliber" to be a CSC manager, rejecting her input at meetings, making fun of her personality type, and failing to give her a gift at a party. But these sorts of disagreements and misunderstandings are ordinary occurrences in a workplace setting. We decline to impute a racial character to them based simply on Hawkins' conjecture.

Hawkins attempts to frame Price's behavior in racial terms by charging that Price did not subject any of Hawkins' white peers to similarly poor treatment. But Hawkins presents no facts that tend to show this allegedly disparate

treatment was due to race rather than Price's admittedly low regard for Hawkins' individual performance. Hawkins has demonstrated that she and Price did not see eye-to-eye. But this showing of a difference of opinion, coupled with Hawkins' conclusory allegations of racism, cannot reasonably support the conclusion that Hawkins' discharge was motivated by racial animus. For "a plaintiff's own assertions of discrimination in and of themselves are insufficient to counter substantial evidence of legitimate nondiscriminatory reasons for an adverse employment action." *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 456 (4th Cir. 1989). And no court sits to arbitrate mere differences of opinion between employees and their supervisors. [1]

B.

Furthermore, the district court did not err in granting summary judgment to Pepsi on Hawkins' hostile environment claims. A plaintiff can prevail on such a claim only when there is racial harassment "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (internal quotation

[1] The district court also correctly granted judgment as a matter of law to Pepsi on Hawkins' retaliatory discharge claims. The McDonnell Douglas framework applicable to claims of race discrimination applies to retaliation claims as well. See *Karpel v. Inova Health Sys. Servs.*, 134 F.3d 1222, 1228 (4th Cir. 1998). Thus, assuming arguendo that Hawkins has made a prima facie case of retaliation, she has failed to prove that Pepsi's legitimate, non-discriminatory reasons for her termination were pretextual for the reasons stated above. Further, Hawkins relies on mere speculation in asserting that her prior racial complaints were the real reason for her termination. As to her prior racial complaints about a Pepsi bottler, Hawkins shows only that Price had some knowledge of her complaints. There is also substantial evidence that Price was dissatisfied with Hawkins' performance before Hawkins' complaints about Price to senior management.

marks omitted). Hawkins relies on much the same evidence to support her hostile environment claims as she does to support her discriminatory discharge claims. For example, in addition to the allegations mentioned earlier, Hawkins claims that she received inadequate coaching, had to do work over and over, was unreasonably required to work late the night of an office Christmas party, and did not have access to the same work opportunities as other managers.

Again, Hawkins cannot show that these problems were racial in nature. Indeed, her complaints about Price's management style toward her are without a hint of racial significance. Even if Price harbored some personal dislike of Hawkins that made Hawkins' job more difficult or stressful, "[a]n employer is not required to like his employees." *Cerberonics*, 871 F.2d at 457 (internal quotation marks omitted). And it is for PepsiCo, not the courts, to rule on the wisdom and generosity of Price's management practices. Thus, in the absence of sufficient evidence of racial harassment, the district court correctly dismissed Hawkins' claims. [2]

We note further that the district court properly dismissed Hawkins' state employment practices claims along with her § 1981 claims because the evidentiary standards for

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[2] The district court also properly awarded summary judgment to Pepsi on Hawkins' claims based on events occurring prior to Hawkins' tenure at the CSC. These claims were time-barred by North Carolina's three-year statute of limitations for § 1981 claims unless Hawkins could show that the alleged incidents were part of a continuing violation. See, e.g., *Beall v. Abbott Lab.*, 130 F.3d 614, 621 (4th Cir. 1997). Because Hawkins cannot maintain a claim based on alleged events within the limitations period, there is no present violation to which any acts outside the limitations period could attach. See *Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 442-43 (4th Cir. 1998) (continuing violation theory requires that at least one act of discrimination occur within the limitations period). And even were Hawkins able to establish a claim based on her CSC experiences, she has failed to demonstrate any connection between her previous difficulties as a Franchise Manager and her problems with Price.

the state and federal claims are the same. See *Hughes v. Bedsole*, 48 F.3d 1376, 1383 (4th Cir. 1995).

We have also reviewed Hawkins' objections to various evidentiary rulings of the district court and find them to be without merit.

III.

There is evidence in the record that suggests Price was a tough, demanding supervisor. Hawkins recounts instances when Price required her to redo documents and work late. Hawkins states that Price was often unreceptive to her ideas. And, as Hawkins alleges, Price's criticism of her may have been blunt and even at times unfair. But the types of difficulties that Hawkins encountered with Price arise routinely in employment relationships. See *Van Stan v. Fancy Colours & Co.*, 125 F.3d 563, 567 (7th Cir. 1997) ("[P]ersonality conflicts and questioning of job performance are unavoidable aspects of employment." (internal quotation marks omitted)). They are an inevitable byproduct of the rough edges and foibles that individuals bring to the table of their interactions. Law does not blindly ascribe to race all personal conflicts between individuals of different races. To do so would turn the workplace into a litigious cauldron of racial suspicion. Instead, legally sufficient evidence is required to transform an ordinary conflict such as that between Hawkins and Price into an actionable claim of discrimination. See, e.g., *Gairola*, 753 F.2d at 1285 (evidence is legally insufficient if verdict for party offering that evidence would be necessarily based on speculation and conjecture). The need for legally sufficient evidence of discrimination is critical in the context of this lawsuit. Otherwise, supervisors such as Price could not evaluate employees of a different race without the prospect of a law-suit. As the Fifth Circuit has noted, without the freedom to criticize performance, an organization simply cannot function. See *Johnson v. Merrell Dow Pharms., Inc.*, 965

F.2d 31, 34 (5th Cir. 1992) ("In order to properly manage its business, an employer must be able to supervise, review, criticize, demote, transfer and discipline employees."). The dilemma is apparent. If supervisors fail to supply enough criticism, they may be accused of a lack of feedback. If they criticize too much, they may be accused of discriminatory harassment. Either way they may find themselves hauled into court to answer for their choice. The instant case illustrates this very danger, as Hawkins at some points takes issue with Price's reticence about her performance and at other points complains about Price's excessive feedback. Her suit amounts mostly to an effort to seek judicial review of the quantity and quality of workplace criticism. The district court properly dismissed the action, for employment discrimination law "is not a vehicle for substituting the judgment of a court for that of the employer." *Jiminez v. Mary Washington College*, 57 F.3d 369, 377 (4th Cir. 1995). Accordingly, the judgment is

AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA, WINSTON-SALEM DIVISION

LISA HAWKINS,

Plaintiff,

v.

PEPSICO, INC. d/b/a PEPSI-COLA NORTH AMERICAN, PEPSI-COLA BOTTLING NORTH AMERICA and PEPSI SOUTH,

Defendant.

6:96CV01013

10 F. Supp. 2d 548; 1998 U.S. Dist. LEXIS 10152;
77 FairEmpl. Prac. Cas. (BNA) 497;
75 Empl. Prac. Dec. (CCH) P45,795

July 6, 1998, FILED
July 6, 1998, ENTERED

DISPOSITION: Defendant Pepsico, Inc.'s Motion for Judgment as a Matter of Law granted. Plaintiff's cause of action dismissed.

CORE TERMS: contractual relationship, at-will, discriminatory, retaliation, prevail, retaliatory discharge, contractual, intentional discrimination, Matter Law, racial discrimination, matter of law, job performance, employment discrimination, substantial evidence, termination, fired, summary judgment, memorandum, infliction of emotional distress, substantial evidence to support, hostile work environment, wrongful termination, employment contract, nondiscriminatory, formation, developmental, broadened, feedback, circumstantial evidence, reasonable probability

COUNSEL: For LISA HAWKINS, plaintiff: JOYCE LEIGH DAVIS, ZOE GABRIELE MAHOOD, JOYCE L. DAVIS & ASSOCIATES, RALEIGH, NC.

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For PEPSICO INC., defendant: CHARISSE R. LILLIE, PAULA CASTALDO COLTON, SUZANNE E. TURNER, DEBRA E. KOHN, BALLARD SPAHR ANDREWS & INGERSOLL, PHILADELPHIA, PA.

JUDGES: William L. Osteen, United States District Judge.

OPINION BY: William L. Osteen

OPINION: MEMORANDUM OPINION

OSTEEN, District Judge

This matter is before the court on Defendant Pepsico, Inc.'s Motion for Judgment as a Matter of Law. For the following reasons, the court will grant Defendant's motion.

FACTS AND PROCEDURE

Plaintiff Lisa Hawkins, who is black, began working for Defendant in 1990 as Brand Manager in retail sales. In 1991, Defendant promoted Plaintiff to Franchise Manager for independently owned bottling facilities. Defendant subsequently transferred Plaintiff to the position of Administrative Manager. In June 1993, Plaintiff became a Customer Sales Manager (Tell-Sell Manager) at Defendant's newly established Customer Service Center (CSC) in Winston-Salem, North Carolina.

Plaintiff's supervisor at the CSC was Sally Price. In October 1993, Price gave Plaintiff written "developmental feedback," which reflected Price's dissatisfaction with Plaintiff's job performance. (Pl.'s Trial Ex. 66.) Plaintiff responded to Price by memorandum, stating that Plaintiff believed Price's criticism was unwarranted and that Plaintiff was experiencing racism and sexual harassment. (Pl.'s Trial Ex. 73.) In December 1993, Plaintiff sent a copy of the memorandum and developmental feedback to Price's supervisor, Brenda Barnes. (Pl.'s Trial Ex. 115.) Further, Plaintiff complained to Ron Parker and Lawrence Jackson, two black Pepsi executives. (Parker Dep. at 156-58; Jackson Dep. at 265-71.) In January 1994, Price formally rated Plaintiff's performance "Below Target," meaning Plaintiff met "some of many but not all position requirements." (Pl.'s Trial Ex. 91.) Price terminated Plaintiff's employment in March 1994. (Pl.'s Trial Ex. 100.) This lawsuit followed.

Plaintiff alleged in her Complaint that Defendant subjected her to a racially hostile work environment, fired her because she is black, and fired her in retaliation for her complaints of racial discrimination, all in violation of *42 U.S.C. § 1981* and North Carolina law. Plaintiff further alleged intentional and negligent infliction of emotional distress, in violation of North Carolina law.

Defendant moved for summary judgment on Plaintiff's hostile work environment and infliction of emotional distress claims only. As an initial matter, the court held barred by the statute of limitations any claims that arose out of Plaintiff's experience at Pepsi prior to the CSC. (Mag. Judge Recommendation, 1/29/98; Order, 3/12/98.) Then, after reviewing Price's treatment of Plaintiff at the CSC, the court granted Defendant's Motion for Summary Judgment on Plaintiff's hostile work environment and infliction of emotional distress claims. Id. Remaining for trial were Plaintiff's discriminatory and retaliatory discharge claims under § 1981 and North Carolina law.

A jury trial began on May 6, 1998. At the close of Plaintiff's evidence, Defendant moved pursuant to Rule 50 of the Federal Rules of Civil Procedure for judgment as a matter of law. Defendant argues that Plaintiff cannot prevail under § 1981 because she failed to establish that she had a contractual relationship with Defendant, and she failed to prove discriminatory and retaliatory discharge. (Def.'s Mem. Supp. Mot. J. Matter Law at 2.) Defendant further argues that Plaintiff cannot prevail under North Carolina law because she failed to prove wrongful or bad faith discharge. Id. at 2-3.

JUDGMENT AS A MATTER OF LAW

Judgment as a matter of law is appropriate when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a). "To defeat an employer's motion for judgment as a matter of law as to liability in a discrimination suit, the plaintiff must present substantial evidence to support as a reasonable probability, rather than as a mere possibility, that her employer discriminated against her because of a protected characteristic." *DeJarnette v. Corning Inc., 133 F.3d 293, 298 (4th Cir. 1998).*

PLAINTIFF'S SECTION 1981 CLAIM

Defendant argues that Plaintiff cannot prevail under § 1981 because she failed to establish that her claims arose out of a contractual relationship. (Def.'s Mem. Supp. Mot. J. Matter Law at 4-5.) Defendant contends that Plaintiff was an at-will employee with no contractual rights defining the term of her employment. Id. Plaintiff counters that she can prevail under § 1981 because "an at-will employment relationship is still a contractual relationship." (Pl.'s Resp. Mot. J. Matter Law at 17.)

Section 1981 states, in relevant part, "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . ." *42 U.S.C. § 1981*(a). "Make and enforce contracts" is defined to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *42 U.S.C. § 1981*(b). A plaintiff proceeding under § 1981 must prove both intentional discrimination and that the discrimination interfered with a contractual relationship. *Murray v. National Broad. Co., 844 F.2d 988, 995 (2nd Cir. 1988); Krulik v. Board of Educ. of City of N.Y., 781 F.2d 15, 23 (2nd Cir. 1986).* Citing Murray and Krulik, district courts within the Second Circuit have repeatedly held that a plaintiff alleging employment discrimination under § 1981 cannot succeed without establishing that the discrimination arose from a contractual relationship.

In *Moscowitz v. Brown, 850 F. Supp. 1185, 1189 (S.D.N.Y. 1994),* the plaintiff brought pursuant to § 1981 discriminatory and retaliatory discharge claims against his former employer. The court examined the terms of the plaintiff's employment to determine whether his claims arose out of a contractual relationship. *Id. at 1192.* Under state law, the plaintiff's employment was terminable at will. Id. Finding no employment contract, the court held that the plaintiff failed to state a § 1981 claim:

> According to the plain language of Section 1981, plaintiff's claim would have to be based on a contractual relationship with the

> [employer], and there is no allegation of such a relationship. [1]

Id.

In *Moorer v. Grumman Aerospace Corp., 964 F. Supp. 665, 667 (E.D.N.Y. 1997),* the plaintiff brought pursuant to § 1981 a discriminatory employment practices claim against his employer. The employer moved for summary judgment, arguing that no underlying contract existed upon which to base the plaintiff's claim. *Id. at 675.* Noting that "by its very terms, Section 1981 governs contractual relationships," the court dismissed the plaintiff's claim. Id. The court held that the plaintiff had failed to establish "the existence of a contractual relationship with the defendant sufficient to support a Section 1981 cause of action." [2] *Id. at 676.*

Plaintiff argues that the court should not rely on Moorer and Moscowitz because these cases wrongly relied upon Murray and Krulik, Second Circuit decisions that were overruled by the 1991 amendments to § 1981. (Pl.'s Resp. Def.'s Mot. J. Matter Law at 17.) Plaintiff contends that the 1991 amendments broadened the scope of § 1981. Id. While the court agrees that the 1991 amendments broadened the scope of § 1981, the court disagrees with Plaintiff's interpretation of the effect of the amendments.

In *Patterson v. McLean Credit Union, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989),* the Supreme Court held that § 1981 did not provide relief for "any claim based on actions which occur after the contract has been

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[1] The court also held that the plaintiff failed to specifically allege that his termination was discriminatory. *Moscowitz v. Brown, 850 F. Supp. 1185, 1193 (S.D.N.Y. 1994).*

[2] The court also held that the plaintiff "produced no evidence of racial discrimination." *Moorer v. Grumman Aerospace Corp., 964 F. Supp. 665, 676 (E.D.N.Y. 1997).*

formed." *Williams v. First Union Nat'l Bank of N.C., 920 F.2d 232, 234 (4th Cir. 1990).* The Supreme Court held that "section 1981's right to make contracts provision governs only conduct prior to the formation of the contract." Id. The 1991 amendments to § 1981 overruled *Patterson. Beardsley v. Webb, 30 F.3d 524, 527 (4th Cir. 1994).* Congress broadened the scope of § 1981 to cover post-contract formation discrimination, including "claims of racial discrimination based upon wrongful termination." *Douglas v. Evans, 916 F. Supp. 1539, 1555 (M.D. Ala. 1996).* What Congress did not do in 1991, however, was remove from the language of § 1981 the phrase "make and enforce contracts."

During a hearing on Defendant's Rule 50 motion, the following exchange occurred between the court and Plaintiff's counsel:

> Court: Now, why does the word contract appear in 1981? Is there any significance in the fact that that appears - -
>
> Defense Counsel: I do not believe so, Your Honor. I think, inherently, all employment relationships, whatever they might be, are contractual in nature.

(Tr. of 5/18/98, at 125.) The court cannot agree with Plaintiff's interpretation of the scope § 1981. To determine whether a claim falls within the scope of a statute, a court must look first to the language of the statute. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108, 100 S. Ct. 2051, 2056, 64 L. Ed. 2d 766 (1980)* ("The starting point for interpreting a statute is the language of the statute itself.") Not only does the language of § 1981(a) employ the phrase "make and enforce contracts," but the statute further defines the phrase to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and

conditions of the contractual relationship. *42 U.S.C. § 1981*(b) (emphasis added).

It is clear from the language of § 1981 that Congress intended for that statute to provide relief for claims of discrimination that arise out of contractual relationships. "Section 1981 was not enacted to duplicate the protection offered by federal antidiscrimination legislation. It was aimed instead at protecting a much narrower scope of activity -- the right to make and enforce contracts." *Williams v. First Union Nat'l Bank, 920 F.2d 232, 235 (4th Cir. 1990).* The scope of § 1981 extends to claims of discrimination that arise out of "contractual employment relationships." *Dennis v. County Of Fairfax, 55 F.3d 151, 155 (4th Cir. 1995).* Thus, in addition to proving intentional discrimination, a plaintiff alleging employment discrimination under § 1981 must prove that the discrimination arose out of a contractual relationship.

Plaintiff argues that an at-will employment relationship is a contractual relationship within the scope of § 1981. (Pl.'s Resp. Def.'s Mot. J. Matter Law at 17.) The Seventh Circuit recently confronted this issue of "whether employment at-will provides a sufficient contractual relationship to support section 1981 claims." *Gonzalez v. Ingersoll Milling Mach. Co., 133 F.3d 1025, 1034 (7th Cir. 1998).* In Gonzalez, the plaintiff brought under § 1981 a discriminatory discharge claim against her former employer. *Id. at 1033.* The defendant moved for summary judgment, arguing that the plaintiff could not prevail under § 1981 because an employment contract setting out the term of employment never existed between the parties. Id. The plaintiff countered that the employee handbook constituted an employment contract. *Id. at 1034.* The district court rejected the plaintiff's argument and held that the plaintiff failed to establish the existence of a contractual relationship

with her employer sufficient to support a § 1981 claim for wrongful termination. [3]*Id. at 1033.*

On appeal, the plaintiff argued that she had an "employment at will" contract. *Id. at 1034.* The Court of Appeals noted first that "in order to bring a section 1981 claim there must at least be a contract." Id. The court examined under state law the terms of the plaintiff's employment and determined that she was an at-will employee. Id. The court then quoted dicta from one of its prior cases: "A contract for employment at will may end abruptly but it is a real and continuing contract nonetheless, not a series of contracts each a day -- or a minute -- long." Id. (quoting *McKnight v. General Motors Corp., 908 F.2d 104, 109 (7th Cir. 1990)).* Thus, the issue for the court was "whether employment at-will provides a sufficient contractual relationship to support section 1981 claims." *Gonzalez, 133 F.3d at 1034.*

The court stated that "arguably," the plaintiff could not proceed under § 1981 because the plaintiff was an at-will employee without contractual rights regarding the term of her employment. *Id. at 1035.* The court cited Moorer and Moscowitz as examples of courts that have dismissed § 1981 claims brought by at-will employees. Id. The court, however, did not decide whether the plaintiff's at-will status was a contractual relationship adequate to support a § 1981 claim because even if it were, the plaintiff failed to submit sufficient evidence to establish intentional discrimination.

Although Gonzalez did not reach the issue of whether employment at-will provides a sufficient contractual relationship to support a § 1981 claim, the court finds persuasive the reasoning employed by the Seventh Circuit.

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[3] The district court further held that even if there were a contract, post-formation discriminatory treatment of an employee was not covered by § 1981. The Court of Appeals properly reversed this holding in the light of the 1991 amendments to § 1981, which made post-contract formation conduct by an employer actionable under § 1981. *Gonzalez v. Ingersoll Milling Mach. Co., 133 F.3d 1025, 1033-34 (7th Cir. 1998).*

The court also finds persuasive the decisions in Moorer and Moscowitz, dismissing § 1981 employment discrimination claims brought by at-will employees.

"North Carolina is an employment-at-will state." *Kurtzman v. Applied Analytical Indus., Inc., 347 N.C. 329, 331, 493 S.E.2d 420, 422 (1997).* The North Carolina Supreme Court has repeatedly held that, subject to limited exceptions, [4]"in the absence of a contractual agreement between an employer and an employee establishing a definite term of employment, the relationship is presumed to be terminable at the will of either party without regard to the quality of performance of either party." Id.

Plaintiff admits that she was an at-will employee, Pl.'s Resp. Def's Mot. J. Matter Law at 17-18, she had no contractual rights with respect to the duration of her employment. Plaintiff contends, however, that her at-will status was a contractual relationship within the scope of § 1981. Plaintiff and Defendant did enter into an agreement: Plaintiff agreed to work for Defendant and Defendant agreed to compensate Plaintiff. (Pl.'s Trial Exs. 3, 43.) Plaintiff's § 1981 claims, however, do not arise out of this agreement but out of Defendant's termination of her employment. Plaintiff had no contract with respect to the continuation or duration of her employment. Thus, Plaintiff's discriminatory and retaliatory discharge claims do not arise out a contractual relationship. The court holds that because Plaintiff's claims do not arise out of a contractual relationship, she cannot prevail under § 1981. An at-will employee alleging wrongful termination cannot prevail under § 1981 because no contractual relationship exists from which the employee's claim could arise.

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[4] Exceptions to the at-will employment doctrine: 1) where the employer and employee contractually agree to a definite term of employment; 2) where the employer violates state or federal anti-discrimination laws; and 3) where the employer violates state public policy. *Kurtzman v. Applied Analytical Indus., Inc., 347 N.C. 329, 331, 493 S.E.2d 420, 422 (1997).*

Even if Plaintiff had established the existence of a contractual relationship with respect to the term of her employment, she failed to "present substantial evidence to support as a reasonable probability, rather than a mere possibility," that Defendant discriminated or retaliated against her. *DeJarnette, 133 F.3d at 298.*

Plaintiff bears the ultimate burden of proving intentional discriminatory or retaliatory discharge. See *Karpel v. Inova Health Sys. Serv., 134 F.3d 1222, 1227-28 (4th Cir. 1998).* In the absence of direct evidence, Plaintiff can rely on circumstantial evidence that establishes an inference of discriminatory or retaliatory intent. See id. Because the record is devoid of any direct evidence, the court examines Plaintiff's circumstantial evidence under the proof scheme set out in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973).*

In McDonnell Douglas, the Supreme Court "established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases."[5] *St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506, 113 S. Ct. 2742, 2746, 125 L. Ed. 2d 407 (1993).* Under the McDonnell Douglas proof scheme, Plaintiff must first establish a prima facie case of discriminatory or retaliatory discharge. See *Karpel, 134 F.3d at 1227-28.* If Plaintiff succeeds, then a presumption is created that Defendant unlawfully engaged in discrimination or retaliation. See *id. at 1227-29; Beall v. Abbott Lab., 130 F.3d 614, 619 (4th Cir. 1997).* Defendant can rebut the presumption by stating legitimate, nondiscriminatory reasons for terminating Plaintiff's employment. See *Karpel, 134 F.3d at 1229; Beall, 130 F.3d at 619.* If Defendant proffers such reasons, then Plaintiff must prove both that Defendant's

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[5] The Supreme Court has held the McDonnell Douglas proof scheme also applies to claims brought under § 1981. See *Patterson v. McLean Credit Union, 491 U.S. 164, 186, 109 S. Ct. 2363, 2377-78, 105 L. Ed. 2d 132 (1989).*

proffered reasons are false and that the real reason is intentional discrimination or retaliation. See *Beall, 130 F.3d at 619.*

Plaintiff's evidence reveals several alleged reasons for her discharge: Plaintiff's job performance, the elimination of her position, her failure to accept a different position at the CSC, the unavailability of a sales position outside the CSC, and her refusal to return to work. (Pl.'s Trial Ex. 91; 5/11/98 Tr. at 16, 31, 48; Marvin Dep. at 200-04, 245-47; Price Dep. at 245-52, 265-74, 282-94.) Defendant may rely on Plaintiff's evidence to satisfy its burden of production under McDonnell Douglas. See *Alires v. Amoco Prod. Co., 774 F.2d 409, 412-13 (10th Cir. 1985); Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1281-82 (7th Cir. 1977); Sime v. Trustees of Cal. State Univ. and Colleges, 526 F.2d 1112, 1113-15 (9th Cir. 1975).* The court finds that Defendant's alleged reasons for discharging Plaintiff, whether taken separately or together, are both legitimate and nondiscriminatory. See *DeJarnette, 133 F.3d at 298-300* (job performance); *Beall, 130 F.3d at 619* (position elimination); *Hartsell v. Duplex Prod., Inc., 123 F.3d 766, 775-76 (4th Cir. 1997)* (refusal to return to work); *United States Equal Employment Opportunity Comm'n v. T.I.M.E.-D.C. Freight, Inc., 659 F.2d 690, 693-94 (5th Cir. 1981)* (refusal to accept other employment opportunities). Thus, the court need not determine whether Plaintiff established a prima facie case of either discriminatory or retaliatory discharge. Instead, the court's focus is on whether Plaintiff presented substantial evidence showing the alleged reasons for her discharge are false and that the real reason is intentional discrimination or retaliation. See *DeJarnette, 133 F.3d at 297-98.*

Plaintiff and several of her co-workers testified that Plaintiff was a good employee, and Plaintiff presented samples of her work product as evidence that she performed her job well. Plaintiff's opinion of her own job performance, however, is irrelevant. See *DeJarnette, 133 F.3d at 299.* "Similarly, that plaintiff's coworkers 'may have thought that

[she] did a good job, or that [she] did not 'deserve' [to be discharged], is close to irrelevant.'" Id. (quoting *Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231, 235 (4th Cir. 1991)*. Further, Plaintiff's work product merely shows that Plaintiff was working, not that she was performing her job well or to Price's satisfaction. Plaintiff failed to present substantial evidence showing that her job performance was not a genuine reason for her discharge. Because Plaintiff has not presented such evidence, the court need not address Defendant's other legitimate, nondiscriminatory reasons for terminating Plaintiff's employment. The court "'does not sit as a kind of super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination . . .'" *DeJarnette, 133 F.3d at 299* (quoting *Giannopoulos v. Brach & Brock Confections, Inc., 109 F.3d 406, 410 (7th Cir. 1997)*.

Plaintiff has not demonstrated that Price's actions were motivated by discrimination or retaliation. Plaintiff presented evidence showing that when Price hired Plaintiff, Price knew Plaintiff's race (Marvin Dep. at 68) and knew that Plaintiff had complained of past racial discrimination at Pepsi (Marvin Dep. at 101-15). Price fired Plaintiff after approximately nine months at the CSC. The court finds that Price's knowledge of Plaintiff's race and past problems coupled with Price's hiring and firing of Plaintiff within a relatively short time span create a strong inference that Price's stated reasons for discharging Plaintiff are not pretextual. See *DeJarnette, 133 F.3d at 298; Jiminez v. Mary Washington College, 57 F.3d 369, 378 (4th Cir. 1995); Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991)*.

Further, Plaintiff has not presented substantial evidence showing that her January 1994 performance evaluation was in any way a result of her sending a memorandum critical of Price to Brenda Barnes or of her complaints to Ron Parker and Lawrence Jackson. In the evaluation, Price noted deficiencies similar to those she noted in the October 1993 developmental feedback, which

was approximately two months prior to Plaintiff's memorandum to Barnes. Plaintiff's evidence shows that Price was dissatisfied with Plaintiff's performance even before Plaintiff contacted Barnes, Parker, and Jackson.

Plaintiff's evidence shows nothing more than Plaintiff's own suspicion that Price fired her because she is black or in retaliation for Plaintiff's complaints of racial discrimination. Because any finding of intentional discrimination or retaliation would be based on speculation or conjecture and not on substantial evidence, the court withdraws Plaintiff's § 1981 claims from the jury.

PLAINTIFF'S STATE LAW CLAIMS

Plaintiff alleges that Defendant's discrimination and retaliation constitute wrongful or bad faith discharge in violation of North Carolina public policy, namely the Equal Employment Protection Act, N.C. Gen. Stat. § 143-422.2. Plaintiff's state claims are based on the same facts as her § 1981 claims. The evidentiary standards for wrongful or bad faith discharge and § 1981 claims are the same. *Hughes v. Bedsole, 48 F.3d 1376, 1383 (4th Cir. 1995); North Carolina Dep't of Correction v. Gibson, 308 N.C. 131, 141, 301 S.E.2d 78, 85 (1983).* Because Plaintiff failed to present substantial evidence to support her § 1981 claims, she cannot prevail on her wrongful or bad faith discharge claims under North Carolina law.

A judgment in accordance with this memorandum opinion shall be filed contemporaneously herewith.

This the 6 day July 1998.

/s/_____
William L. Osteen
United States District Judge
JUDGMENT

OSTEEN, District Judge

In accordance with the memorandum opinion filed contemporaneously herewith,

IT IS ORDERED AND ADJUDGED that Defendant Pepsico, Inc.'s Motion for Judgment as a Matter of Law is granted.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's cause of action is hereby dismissed.

This the 6 day July 1998.

/s/_____
William L. Osteen
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

LISA HAWKINS,	)	
	)	
Plaintiff,	)	
v.	)	6:96CV01013
	)	
PEPSICO, INC., d/b/a Pepsi-Cola North America, Pepsi-Cola Bottling North America, and Pepsi South,	)	
	)	
Defendant.	)	

Entered March 12, 1998

ORDER

On January 29, 1998, the Recommendation of the United States Magistrate Judge was filed and notice was served on the parties pursuant to 28 U.S.C. § 636. Thereafter, the Court received plaintiff's objections to the Recommendation.

The Court has appropriately reviewed plaintiff's objections de novo and finds they do not change the substance of the United States Magistrate Judge's rulings which are affirmed and adopted.

NOW, THEREFORE, pursuant to the Recommendation of the United States Magistrate Judge, it is **ORDERED** that defendant's motion for summary judgement (docket no. 39) is granted and that Counts II and III of the complaint are dismissed and that all parts of Counts I and IV equally are dismissed, except for plaintiff's claim of discharge based on racial discrimination and retaliatory discharge.

/s/ _____
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

LISA HAWKINS,

Plaintiff,

v.

PEPSICO, INC., d/b/a PEPSI-COLA AMERICA,
d/b/a PEPSI-COLA BOTTLING NORTH AMERICA,
d/b/a PEPSI SOUTH,

Defendant.

6:96CV01013

Entered: January 29, 1998

RECOMMENDATION OF

UNITED STATES MAGISTRATE JUDGE

Statement of the Case and Legal Standards

On September 12, 1996, plaintiff filed a four-count complaint against defendant in Forsyth County Superior Court. This complaint was removed by defendant to this Court on December 2, 1996. Count I of plaintiff's complaint (docket no 1.) alleges that defendant discriminated against her on the basis of race in violation of 42 U.S.C. § 1981. The remaining counts allege that defendant's actions also support state law claims of intentional infliction of emotional distress (Count II), negligent infliction of emotional distress (Count III), and wrongful employment practices in violation of public policy and N. C. Gen. Stat. § 143-422.1 (EEPA) (Count IV). Defendant has now moved for summary

judgment on Counts II and III and part of Counts I and IV[1] pursuant to Rule 56 of the Federal Rules of Civil Procedure. (Docket no. 39)

Summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the evidence in light most favorable to the non-moving party. Pachaly v. City of Lynchburg, 897 F.2d 723, 725 (4th Circ. 1990). It may not weigh conflicting evidence or resolve disputed facts. Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985). However, when opposing a properly supported motion for summary judgment, the party cannot rest on conclusory statements, but must provide specific facts, particularly when that party has the burden of proof on an issue. Id. Plaintiff's evidence must amount to more than a scintilla or speculation. It must cite specific material facts which are significantly probative as to the elements of proof. Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp., 65 F.3d 1113, 1119 (4th Cir. 1995); Sylvia Development Corp. v. Calvert County, Md., 48 F.3d 810, 818 (4th Cir. 1995). Unfortunately, plaintiff's presentation does not meet these standards. The Court has reviewed all of plaintiff's evidence citations in her brief (and generally looked through the record), but finds that for the most part, her allegations are conclusory.

In addition, with respect to three of plaintiff's four claims which are based on the law of the State of North Carolina, special rules apply. When state law is unclear, the federal court must rule in such a manner as it appears the highest state court would rule if presented with the issue. Where the state's highest court has not decided the particular

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[1]Defendant does not seek dismissal of plaintiff's claims of unlawful discharge or retaliatory discharge in Counts I and IV.

issue, the federal court should examine the rulings of the lower state courts. Rulings of the lower courts may be considered as persuasive evidence of state law, but they are not binding on the federal court should it be convinced the highest court would rule to the contrary. Sanderson v. Rice, 777 F.2d 902, 903 (4th Cir. 1985), cert. denied, 475 U.S. 1027, 106 S.Ct. 1226, 89 L.Ed.2d 336 (1986). Furthermore, the federal court must rule on state law as it exists, as opposed to surmising or suggesting an expansion of state law. Burris Chemical, Inc. v. USX Corp., 10 F.3d 243 (4th Cir. 1993).

Facts

Although plaintiff fails to offer sufficient specific proof to satisfy her claims, the Court will review her allegations in order to give the matter perspective for further discussion. These allegations, taken from plaintiff's response to defendant's motion for summary judgment (docket no. 44), are as follows.

Plaintiff is an African-American female who was hired by defendant in June of 1990. Initially she worked as a Brand Manager and a management designate and received favorable recommendations. In April of 1991, plaintiff was promoted to Franchise Manager, a position which required her to deal frequently with the managers of defendant's franchise bottling companies. Her immediate supervisor in the position was Dave Bedford.

One of the bottlers with who plaintiff needed to communicate was Lee Teeter who manages a bottling company located in Hickory, North Carolina. Plaintiff contends that she heard from a fellow employee that Teeter had made racial remarks concerning plaintiff including telling Bedford that he made a mistake in making a "nigger" a manager and that doing so was career suicide for Bedford (Bedford, Teeter, and the employee who allegedly informed plaintiff of these statements deny the this occurred). Plaintiff

also heard, and Bedford confirmed, that Teeter was erroneously saying that she was trying to start a union of black employees. Plaintiff reported Teeter to several higher corporate officials, but apparently nothing in the way of action against Teeter ever came from these reports. During this time, relations between plaintiff and Teeter, with whom she had to interact as part of her job, were strained and plaintiff felt that she could not do her job effectively.

In April of 1992, defendant decided that it would be best for plaintiff to be in a different job. However, no suitable jobs were available, so plaintiff was sent home on administrative leave for six months until a job could be found. Finally, in November of 1992, plaintiff was made Administrative Manager at defendant's Winston-Salem plant with Dan Crets as her immediate supervisor. When offered the position, plaintiff was told she would be supervising twenty people. In reality, she supervised only five secretaries. Sometime after arriving at her new job, plaintiff learned that prior to her arrival, plant employees had heard of her difference with Teeter and he had been warned by a fellow employee that starting a friendship with plaintiff would be "career suicide." This allegedly caused fellow employees to distance themselves from her and not accept her. Once again, plaintiff reported this to higher officials in the company. After less than seven months in this position, plaintiff reported to defendant that her position was obsolete, unneeded and recommended that the company eliminate the position in order to save money. The post was not filled after plaintiff left it in June of 1993.

Plaintiff's reason for leaving her position as Administrative Manager was to accept a job as one of two Tel-Sell Managers at the new Customer Service Center (CSC) in Winston-Salem. Sally Price managed the CSC and was plaintiff's direct supervisor. Jane Marvin was the CSC's Human Resources Director. Even before plaintiff began her job, Marvin heard about plaintiff's problems with Teeter and

heard erroneously that plaintiff was suing defendant.[2] Nevertheless, plaintiff did arrive and begin her job in June of 1993 before the CSC opened. Soon after, it was discovered that only one Tel-Sell Manager would be required. The position was given to Kevin McInerney, a white male who had been designed as the other Tel-Sell Manager when the company believed that two managers were needed. Plaintiff was assigned to working on "special projects."

Plaintiff claims that, during her time at the CSC, Price treated her very differently from similarly situated white employees. She states that she was overly criticized in public, accused of not being a team player, told to do her own job when she made special efforts to be a team player, received no coaching, was under unrealistic deadlines, was forced to redo work over and over, did not have the same access to resources as other managers, was criticized for using e-mail, had her ideas dismissed in meetings more frequently than did white managers, and was criticized for being different when she wore a suit to work. She also reports other specific incidents which she claims support her discrimination allegations. Price told her she was not of sufficient "caliber" for her job. McInerney allegedly told a joke with racial connotations in front of her at a meeting in New York. Also, while Price criticized work that the plaintiff did alone, she praised the same work when told (untruthfully) that a white manager had helped with the work. Two fellow employees, Fran Healy, a white female manager and Fred Canady, a black male director, support some portions of plaintiff's allegations concerning her treatment by Price. (Docket no. 44, Exs. J and I, respectively.)

As she had done before, plaintiff reported the problems and the apparent discrimination at the CSC to appropriate company officials. However, the investigation

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[2]Actually, Marvin testified that she heard plaintiff "might be suing the corporation." (Docket no. 45, Ex. L at p. 104).

was left up to Price and no changes resulted. Finally, in March of 1994, plaintiff was fired by defendant.

Discussion

A. Statute of Limitations

As a preliminary matter, defendant raises the statute of limitations as a partial defense to plaintiff's claims. The parties agree that the statute of limitations as to all of plaintiff's claims is three years. However, they disagree as to how the running of the statute should be judged. Defendant contends that plaintiff's suit can be based only on incidents which occurred within three years of the filing of the suit on September 12, 1996. Plaintiff agrees that the statute of limitations is three years, but contends that under the continuing violation theory, the statute of limitations does not begin to run until the last act of discrimination, in this case her dismissal from employment of March 3, 1994. To come under this theory, she must show incidents prior to September 12, 1993 are all part of a series of related acts. Beall v. Abbott Laboratories, 130 F.3d 614, 620 (4th Cir. 1997). It must be a practice which continues. See Polsby v. Chase, 970 F.2d 1360, 1365 n.3 (4th Cir. 1992), cert. granted sub nom and judgment vacated on other grounds, Polsby v. Shalala, 507 U.S. 1048, 113 S.Ct. 1940, 123 L.Ed.2d 646 (1993).

In order to succeed under this theory:

> A plaintiff must "prove a series of continuous violations constituting an organized scheme leading to a present violation." Berry v. Board of Supervisors, 715 F.2d 971, 981, (5th Cir. 1983), cert. denied, 479 U.S. 868, 107 S.Ct. 232, 93 L.Ed.2d 158 (1986). To accomplish this, a plaintiff must establish: (i) that the one

> timely act involved the same type of discrimination; (ii) that the acts and events sought to be linked in a continuing violation theory were regular or recurring; and (iii) that the events had a degree or permanence that would alert the plaintiff that her rights had been violated. [Waltman v. International Paper Co., 875 F.2d 468, 475 (5th Cir. 1989)].

Crittendon v. American Nat. Ins. Co., 967 F.Supp. 933, 939 (S.D.Tex. 1997). Vague or conclusory allegations of continuing discrimination will not suffice to satisfy this burden. Boyle v. Brown University, 881 F. Supp. 747, 751 (D.R.I.) aff'd, 70 F.3d 110 (1st Cir 1995); Alveari v. American International Group, Inc., 590 F. Supp. 228, 231 (S.D.N.Y. 1984). A continuing violation cannot be proven from isolated instances even if the effects continue. Jenkins v. Wal-Mart Stores, Inc., 910 F. Supp. 1399, 1414 (N.D. Iowa 1995).

In the instant case, plaintiff was working at the CSC when the statute of limitations ran. At the CSC, her problems centered around her supervisor Price and plaintiff's dissatisfaction with Price's supervisory practices.[3] There is no showing that these practices are connected to her problems with Teeter, who was only one of the bottlers with whom she had to work. There is no connection with that incident and the problems involving Price. Therefore, the Court will only look to the alleged practices encountered by

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[3]"Hawkins' career was in sales, with her supervisors being John Budzak when she was a Brand Manager or management designate (June 1990 - April 1991) (Exh. D. Budzak Depo., p. 33); Dave Bedford when she was a Franchise Manager (April 1991 until about April 1992) (Exh. A. Hawkins Aff., ¶3); Dan Crets in the Administrative Manager position (November 1992 until about June 1993) (Id. at ¶4); and Sally Price in the Tel-Sell Manager position (June 1993 - March 4, 1994) (Id. at ¶5)" (Plaintiff's brief. docket no. 44, at 2).

plaintiff while she was at the CSC and concerning Price's supervision of her. Any other claims are time barred.

B. Count I -- Racial Discrimination Under 42 U.S.C. § 1981

The parties agree in their pleadings that, in order to prevail on her claim for racial harassment under 42 U.S.C. § 1981, plaintiff must demonstrate that she was subjected to a racially hostile work environment. They do not so much disagree as to what the test should be for determining whether a "racially hostile" work environment exists, but whether plaintiff has revealed sufficient specific facts to meet the test.

In its brief in support of its motion for summary judgment (docket no. 40), defendant contends that in order to find a racially hostile work environment there must be " 'repeated racial slurs and management's condonation and tolerance of the situation' " (Docket no. 40 at 8) Plaintiff, on the other had, stresses that such outlandish conduct is not necessary to satisfy the totality of the circumstances test which is aimed at determining whether or not the harassment is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive environment." Harris v. Forklift Systems, Inc., quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65, 106, S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986).

In Harris, the Supreme Court, in addition to the language quoted above, stated explicitly that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances." Harris, 510 U.S. 17, 23 114 S.Ct. 367, 371.

In applying the totality test, the Supreme Court set out factors for determining whether the test has been met. They include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it

unreasonably interferes with an employee's work performance." Harris, 510 U.S. 1723, 114 S.Ct. 367, 371. The Fourth Circuit utilizes this test. See Beardsley v. Webb, 30 F.3d 524, 529 (4th Cir. 1994) (quoting Harris regarding the consideration of all circumstances and the particular factors to be considered).

Considering all circumstances, and in particular the specific factors mentioned in Harris, the Court finds that plaintiff has not made sufficient allegations to support a hostile work environment claim. For this purpose, the Court has only considered events taking place on or after September 12, 1993. There may be a question as to whether plaintiff's allegations even satisfy the Harris test because more offensive utterances will not suffice and plaintiff fails to show that the conduct unreasonably impaired her work performance. In any event, her proof is conclusory and, thus, it fails.

Plaintiff's list of events which allegedly show racially discriminatory harassment are set out on pp. 6-9 of her brief. The first event she mentions is the fact that the white male, Kevin McInerney, was given the Tel-Sell Manager position and she did not receive it. However, this fact alone signifies nothing. She fails to offer any proof showing that she was more qualified than McInerney to have this position. Plaintiff then makes the allegation that she was relegated to a special projects job which was not real. However, she fails to explain this conclusion or its basis.

Plaintiff then states that she was treated differently that similarly situated white employees because she "was overly criticized in public; wrongly accused of not being a team player; and when paying special attention to being a team player, she was harshly told to do her own job." For this event, plaintiff merely cites her affidavit, which is conclusory. She fails to describe the criticism, when it happened, or what it was about. She fails to show that the criticism of her not being a team player was not accurate.

Her conclusory statements merely come from her own affidavit.

Plaintiff next states that she "did not receive coaching; was subjected to downright humiliation and unrealistic deadlines, was harassed with respect to her work; had to redo work over and over; and did not receive the same opportunities other managers had to access other resources." These allegations come from her deposition at pp. 326-328. She fails to prove what "coaching" she was entitled to receive and what specific work she did that was either praised or criticized. The same is true with plaintiff's complaint that she may have had to work over a weekend. Here, plaintiff complains that she should not have to do this without receiving help from other people. She does not identify the "team player" incidents. Not only is this kind of complaint conclusory, but it also fails to show that other employees did not face similar situations.

Plaintiff complains because at a business event other people received a gift from her supervisor (Price) but she did not. This event is identified as a Christmas party and is a specific event which the Court can consider.

Plaintiff complains that she was criticized for dressing up and being different. This comes form her deposition testimony at page 332. A review of that testimony discloses that Ms. Price likely did not make the remarks attributed to her but that plaintiff was the one who drew the inferences from Price's statement, "why are you wearing a suit." At this same point, plaintiff complains about not being given affirmation in form of her peers, but again no specifics are given as to when and what affirmation was required to have been given and for what reason. Plaintiff also complains because she was told that she was not of the caliber to perform the job and was rated below target. This comes from plaintiff's affidavit, but there is no proof that those statements were not true nor when the statements were actually made and for what reason.

Plaintiff states that a joke with a racial connotation was made in front of her. Another of defendant's employees named Fran Healy corroborates that on a trip to New York one of defendant's employees made a statement to the effect that if somebody dropped him off in Harlem he would not know what to do. Plaintiff fails to give the details of this so-called joke or why she considered that it had racial connotations. The most that she could say was that she took offense to it. However, the Court finds this offer to be conclusory and does not show an event of racial harassment or discrimination.

Plaintiff did offer the deposition of a white female account receivable manager, Fran Healy who, according to plaintiff, verifies her complaint. Healy's deposition is cited at docket no. 45, Ex. J, pp. 27-29, 38, 43-45. It appears that when plaintiff worked in the Tel-Sell job, she and Healy worked together. Healy states that she and plaintiff worked well together and that plaintiff was considered to be a team player. She did not observe any deficiencies. She did note that plaintiff had to work more hours than the rest. There is no indication this was because plaintiff was given more work or whether she just worked slower than others. With respect to Ms. Price's treatment of plaintiff, all Healy could say is that Price had different expectations but also that plaintiff had a different position. (Id. at 31) Healy states that the expectations plaintiff was given exceed that and were, in her opinion, unrealistic compared to that of the accounts receivable manager. Of course, it should be remembered that Healy states that the positions are different.

One specific example is given with respect to preparation of presentations or training manuals. According to Healy, plaintiff was not given sufficient time and was criticized about the manuals. However, Healy does not state the basis for her conclusion as to how she was in a position to evaluate and judge plaintiff's work. That is, Healy did not testify that she prepared the same manuals, had experience in

preparing the same or similar manuals, and was treated differently.

Healy also offered opinions that plaintiff was criticized more frequently and her opinions were dismissed. However, she gives no basis for her being able to make that kind of judgment. These are merely conclusory opinions without any foundation being given. Healy states that Kevin McInerney treated plaintiff differently, but a close reading of her testimony indicates that according to her, he did not share information, not only with plaintiff, but also with the rest of the team. (Id. at 43) She specially could not recall information that was allegedly not being shared. (Id. at 44)

As with plaintiff's own affidavit and deposition, there are one or two events which are linked to a specific time, date, place and content. However, even as to those, there is not basis for concluding that plaintiff was treated unfairly or undeservedly, much less for reasons based on racial discrimination. These are merely the unfounded opinion of Ms. Healy.

Plaintiff also cites to the deposition testimony of Fred Canady, CSC's Director of Process Integration, as establishing plaintiff's cause. (Docket no. 45, Ex. I, pp. 51-52) Canady gives the opinion that plaintiff worked well. However, he fails to give any basis for being able to make that opinion. The same is true with his observations that plaintiff worked well with her peer and was a team player. In fact, it appears that for the most part this witness was not privy to other work which Price scrutinized. (Id. at 55) He makes the statement that blacks felt or suffered Price's management style differences more than other employees but fails to provide a reason or basis for this conclusion. (Id. at 46) It also appears that Canady may not have liked Price because she had criticized Canady. He had no knowledge whether he or plaintiff were rated below target, but merely believed that to be true. (Id. at 38) As with Healy, there are few, if any, references to specific events to which his testimony could be tied in order to understand what facts

constituted the event. There is simply not sufficient evidence of events in Canady's testimony to form a belief that plaintiff was subjected to racial harassment.

Next, plaintiff complains that when she reported racism and sexual harassment, defendant did nothing but to let Price, her alleged antagonizer, investigate the complaint. The evidence for this allegation is in paragraph 28 of plaintiff's affidavit. (Id. Ex. A, at 5) As it turns out, plaintiff wrote the memorandum to Price and only sent a copy to Price's supervisor. She never mentioned Price by name. Therefore, plaintiff's complaint that defendant did something wrong by having Price investigate this matter is completely frivolous. It may also be noted that plaintiff has not identified the alleged sexual harassment which was supposedly of an equal concern to her at that time. This piece of evidence detracts from plaintiff's claim of harassment.

Plaintiff may not rest her complaint on conclusory allegations or a mere scintilla of evidence. While she presents many allegations of being treated differently, in none of them is there any hint that this was done because of her race. What plaintiff complains about is the management technique of Sally Price. Aside form the comment attributed to Teeter, which is outside the limitations period, plaintiff does not even show that Price's action were in any way based on race. The evidence shows that in plaintiff's opinion, Price was a hard, abrasive, mean, and poor manager. However, this Court does not sit as a super-personnel agency to rule on the wisdom of management practice. Beall, 130 F.2d 614. In this case, there is nothing to indicate that Price's criticisms or treatment of plaintiff were unfair or not equally shared by others. Plaintiff's evidence merely shows that she was a hard task master. Plaintiff's evidence fails to show a hostile work environment. Therefore, summary judgment should be granted as to Count I of plaintiff's complaint.

C. Count II -- Intentional Infliction of Emotional Distress

Plaintiff's second cause of action, set out in Count II of her complaint, is a state law claim of intentional infliction of emotional distress. In order to prevail on such a claim, plaintiff must show that (1) defendant engaged in extreme and outrageous conduct (2) intending to cause and actually causing (3) severe emotional distress. Patterson v. McLean Credit Union, 805 F.2d 1143, 1146, (4th Cir. 1986), aff'd in part and vacated in part, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). Defendant asserts that plaintiff has failed to produce evidence satisfying the first element of extreme and outrageous conduct by defendant.

The standard for what constitutes extreme and outrageous behavior in North Carolina is "a stringent one." Id. In order to support her claim, plaintiff must show that defendant's actions were so extreme and outrageous that they exceeded all bounds usually tolerated by decent society. Dickens v. Puryer, 302 N.C. 437, 447, 276 S.E.2d 325, 331 (1981). Whether the conduct is so extreme and outrageous is a question of law for the Court. Brown v. Burlington Indus., Inc., 93 N.C. App. 431, 436, 378 S.E.2d 232, 235 (1989), cert. dismissed, 326 N.C. 356, 388 S.E.2d 769 (1990). Further, conduct within the scope of one's employment is not normally extreme or outrageous. Murray v. Justice, 96 N.C. App. 169, 176, 385 S.E.2d 195, 200 (1989), rev. denied, 326 N.C. 265, 389 S.E.2d 115 (1990). This includes supervisory decisions. Lymangrover v. Wake Forest University, 99 N.C. App. 222, 393 S.E.2d 362 (1990) (Table), rev. denied, 328 N.C. 91, 402 S.E.2d 414 (1991) (citing McKnight v. Simpson's Beauty Supply, Inc., 86 N.C. App. 451, 358, S.E.2d 107 (1987)).

Cases from the North Carolina Court of Appeals provide the Court with some examples of what constitutes extreme and outrageous conduct. One case where a plaintiff prevailed is the case of Wilson v. Pearce, 105 N.C. App. 107,

412 S.E.2d 148 (1992), rev. denied, 331 N.C. 291, 417 S.E.2d 72 (1992). In that case, defendants, who were neighbors of the plaintiffs, continually harassed the plaintiffs for nine years despite knowing of plaintiff's heart condition. The harassment included threats with what appeared to be a gun, throwing broken glass into plaintiffs' yard, threats to kill, obscene gestures, and falsely reporting plaintiffs and their children to various authorities on several occasions. Id. 105 N.C. App. at 115-117, 412 S.E.2d at 152-153. In an employment context, extreme and outrageous behavior was found when a supervisor made sexually suggestive and graphic comments to a female employee two to three times a week for two years. The harasser also implied that the employee had to sleep with him to keep her job and once insinuated that she had to kiss him in order to receive her pay check. See Brown, 93 N.C. App. at 435, 378 S.E.2d at 234-235.

Claims or proof of racial discrimination alone do not constitute extreme and outrageous conduct. Thus, in Frazier v. First Union Bank, 747 F. Supp. 1540 (W.D.N.C. 1990), allegations of racial discrimination for failure to promote, discharging, harassing, and failing to pay adequately, did not amount to extreme and outrageous conduct under North Carolina law. Id. at 1554. Likewise, complaints of "too much work, required her to sweep and dust, and comment[s] that blacks are slower than whites" did not amount to extreme and outrageous conduct. Patterson, 805 F.2d at 1146.

Perhaps the most instructive case on the issue is Hogan v. Forsyth Country Club Company, 79 N.C. App. 483, 340 S.E.2d 116 (1986), rev. denied, 317 N.C. 334, 346 S.E.2d 140 (1986). In that case the North Carolina Court of Appeals ruled that only one of three plaintiffs had suffered harassment which rose to the level of extreme and outrageous conduct. The only plaintiff who prevailed had suffered sexually suggestive remarks and physical touching of a sexual nature. When these advances were refused, her

harasser screamed obscenities at her and once came towards her with a knife which he slammed on the table in front of her. Id. 79 N.C. App. at 490, 340 S.E.2d at 121. As for the other two plaintiffs, one had been shouted and screamed at, called names, and had menus thrown at her. The other, while pregnant, was denied leave, forced to do demanding physical labor, cursed at, and not allowed to seek medical attention when she began having labor pains. The court found that the harassment suffered by the last two plaintiffs was not extreme and outrageous as defined under North Carolina law. Id. 79 N.C. App. at 493-494, 340 S.E.2d 122-123.

Looking at the body of case law defining extreme and outrageous behavior, the Court finds that the harassment allegedly suffered by plaintiff in the present case does not meet the "stringent" standard required by North Carolina law. Although not exclusively relying on these criteria, the cases where courts have found that extreme and outrageous behavior tend to involve overt actions and the occurrence or threat of a physical assault. Plaintiff in this case does allege that racial slurs were used. However, they were made outside the relevant time period, at a different job site, not made by defendant's employees, and were not directed at her in her presence. Further, plaintiff was never physically harmed, threatened, or intimidated in any way. Plaintiff's allegations of unpleasant job conditions are quite similar to those rejected in Patterson and Frazier. Because the Court has determined that her proffered evidence does not establish a hostile work environment. That means her emotional distress claim is insufficient as well. Hartsell v. Duplex Products, Inc., 123 F.3d 766 (4th Cir. 1997).

Plaintiff argues that some North Carolina cases find extreme and outrageous behavior even when no physical touching occurs and when the behavior is the mere spreading of rumors. She cites Bryant v. Thalhimer Bros., Inc., 113 N.C. App. 1, 437 S.E.2d 519 (1993), rev. denied. 336 N.C. 71, 445 S.E.2d 29 (1994) and Chapman v. Byrd, 124 N.C.

App. 13, 475 S.E.2d 734 (1996), rev. denied, 345 N.C. 751, 485 S.E.2d 50 (1997), respectively, for these propositions. These cases are factually distinguishable. In Bryant, a sexual harassment case, plaintiff's supervisor rubbed his penis on her hand and there was a long list of specific incidents of direct threats and name calling which had no conceivable business purpose. In Chapman, extreme and outrageousness conduct was found because of public repetition of rumors concerning an employee of a restaurant being HIV positive by persons who the public would see as credible on matters of public health. Id. 124 N.C. App. at 20, 475 S.E.2d at 739. None of these factors are present in the case before the Court. Plaintiff's claims describe behavior which, if it occurred and was undeserved, was unfortunate, but does not amount to extreme and outrageous conduct under North Carolina law.

D. Count III -- Negligent Infliction of Emotional Distress

Both the parties and emerging North Carolina case law agree that extreme and outrageous conduct by the defendant is necessary in order to sustain a claim of negligent infliction of emotional distress. Lorbacher v. Housing Authority of the City of Raleigh, ____ N.C. App. ____, 493 S.E.2d 74, 82 (1997); Graham v. Hardee's Food Systems, Inc., 121 N.C. App. 382, 386-387, 465 S.E.2d 558, 561 (1996). Since, for the reasons stated above, plaintiff's evidence does not show that such conduct is present in this case, plaintiff's negligent infliction of emotional distress claim fails. Also, she must establish an independent tort committed by one of the defendant's employees which caused injury. Plaintiff has failed to do this. Hartsell v. Duplex Products, Inc., 123 F.3d at 744. Therefore, the Court recommends that defendant's motion for summary judgement be granted as to this claim and that the Count III of plaintiff's complaint be dismissed.

E. Count IV -- Wrongful Employment Practices Under State Law

In the plaintiff's fourth cause of action, she states that defendant's actions "in discriminatorily treating and discharging plaintiff because of her race and in retaliation for having complained of race discrimination constitute wrongful employment practices and also is in violation of [sic] N.C.G.S. § 143-422.1, et seq [sic] and the public policy of the State of North Carolina." Defendant's motion in this regard is a little perplexing. As with its motion in regard to Count I, it appears that defendant is only requesting dismissal of that part of Count IV which encompasses claims other than wrongful discharge in violation of North Carolina public policy. Plaintiff also so reads that motion. The evidentiary standards for federal civil actions, particularly Title VII and for claims under N.C.G.S. § 143-422.2 are the same. Hughes v. Bedsole, 48 F.3d 1376 (4th Cir.), cert. denied, ____ U.S. ____, 116 S.Ct. 190, 133 L.Ed.2d 126 (1995). The Court has already indicated that plaintiff has failed to produce sufficient evidence to maintain a claim for hostile work environment discrimination under federal law. This equally applies to plaintiff's state law claim. This appears to leave plaintiff's claim under Count IV for discriminatory discharge and retaliatory discharge under state law. It does seem that the evidence would support a finding that plaintiff has established a prima facie case. This would require defendant to produce evidentiary reasons for the discharge rebutting the prima facie case. Plaintiff would then have to show the reasons were pretextual. Defendant has not produced its reasons nor even requested a dismissal on those grounds. Therefore, the trial should proceed on that count for unlawful discharge and retaliatory discharge.

IT IS THEREFORE RECOMMENDED that defendant's motion of summary judgment (docket no. 39) be granted and that Counts II and III of the complaint be

dismissed and that all Counts I and IV equally be dismissed, except for plaintiff's claim of discharge based on racial discrimination and retaliatory discharge.

/s/ _____
United States Magistrate Judge

January 29, 1998

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2193
CA-96-1013-6

LISA HAWKINS,

Plaintiff - Appellant

v.

PEPSICO, INCORPORATED,
d/b/a Pepsi-Cola North America,
d/b/a Pepsi-Cola Bottling Company,
d/b/a Pepsi South

Defendant - Appellee

Entered March 14, 2000

AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION, INCOPORATED; NORTH CAROLINA ACADEMY OF TRIAL LAWYERS

Amici Curiae

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

/s/ Patricia S. Connor
Clerk